Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies	)	MM Docket No. 98-204

TO THE COMMISSION

COMMENTS OF EEO SUPPORTERS

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National Asian Pacific American Legal Consortium
National Association for the Advancement of Colored People
National Association of Black Journalists
National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals

[Organizations continued on following page]

COMMENTS OF EEO SUPPORTERS
MM Docket No. 98-204

Commenting Parties (continued)

National Association of Hispanic Journalists
National Association of Hispanic Publications
National Bar Association
National Council of Hispanic Organizations
National Council of La Raza
National Council of the Churches of Christ in the United States
National Hispanic Foundation for the Arts
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Latino Telecommunications Taskforce
National Newspaper Publishers Association
National Urban League
Native American Journalists Association
Puerto Rican Legal Defense & Education Fund
San Diego Community Broadcasting School, Inc.
Telecommunications Research and Action Center
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press

April l5, 2002

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Dedication: Benjamin Hooks

We always dedicate comments in major rulemaking proceedings to towering figures in the world of the FCC. Our choice this time was easy to make. There would never have been a meaningful equal opportunity program in mass media without Dr. Benjamin L. Hooks.

The EEO rules had just been adopted when longtime clergyman, civil rights lawyer and Judge Benjamin Hooks arrived at the Commission in 1972 as its first African American commissioner. Without Dr. Hooks, the EEO rules would have been an historical anachronism. Dr. Hooks and his staff -- Lionel Monagas, Norman Blumenthal, Clarence McKee and others -- doggedly worked to give life to the EEO rules. Dr. Hooks led the opposition to an ill-conceived 1976 attempt to exempt two-thirds of broadcast licensees from recruitment responsibilities; ultimately he was vindicated by the Second Circuit in Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977) ("UCC III"). This dissent and many others in civil rights cases kept the Commission honest and on course. The only true orator ever to serve on the FCC and probably one of the most gifted speakers of the twentieth century, Dr. Hooks often brought audiences to their feet with applause as he expounded with deep passion on the need for equal opportunity in the media and telecom industries.

In l977, Dr. Hooks was poised to become Chairman of the FCC. Instead, to the surprise of most of us in the FCC's world, Dr. Hooks chose instead to take a cut in pay and become Executive Director of the NAACP, where he served with distinction for l9 years. Those of us in the trenches often think of l977 and what could have been -- the dream deferred but finally twice realized.

After assuming the leadership of the NAACP, Dr. Hooks continued to serve as an advocate for equal opportunity in broadcasting and cable. Under his stewardship, the NAACP and its branches challenged the license renewals of hundreds of stations and brought, most famously, Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) ("Beaumont NAACP"), the case in which the D.C. Circuit commanded the FCC to conduct meaningful investigations of serious allegations of discrimination.

Dr. Hooks is in Memphis again, serving as a pastor, a civil rights leader (in the Leadership Conference for Civil Rights), a writer and scholar. He is in poor health but he is at peace, endowed with a profound sense of humility and grace.

If the undersigned counsel may speak briefly in the first person: in 1996 I was privileged to interview Fred Albertson at his home in Key Biscayne, Florida. Then 90 (and since deceased), Albertson was a giant of communications law -- the Albertson in Dow, Lohnes & Albertson. I inquired of him how broadcasters became motivated to pay attention to minority ownership and EEO. Albertson, who was very frail at this time in his life, suddenly became energized, leaned forward in his wheelchair and declared "that happened mostly because of one man: Ben Hooks. Everyone loved and respected Ben, but most of all we listened to him. Diversity in broadcasting got its start because of Ben Hooks. That's who you should thank." And today, we do.

* * * * *

Summary

These Comments are filed by the largest and broadest coalition of nonprofit organizations ever to participate in an FCC rulemaking proceeding. The forty-five organizations signing onto these Comments include, among others, most of the nation's national civil rights organizations, all five of the national organizations of minority journalists, both national organizations of minority publishers, most of the national organizations of media and telecommunications professionals and of communications scholars; as well as the nation's largest religious organization, the nation's largest organization of minority lawyers, all of the nation's independent minority controlled broadcast training schools, and both of the nation's trade organizations representing minority owned broadcasters. Notably, it includes the Office of Communication of the United Church of Christ, Inc., whose 1967 petition for rulemaking led to the Commission's original EEO rules.

We speak today with one voice to endorse most of the proposals in this Second Notice of Proposed Rulemaking.[1/]

We have invested the effort required to submit a comprehensive set of proposals because of the importance, breadth, and subtleties of the issue before us. EEO demands no less care and thoroughness of analysis than health care,

airline safety, immigration, water, air and food quality -- and telephone and cable rates. Our goal is to illustrate:

1/ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second Notice of Proposed Rulemaking), 16 FCC Rcd 22843 (2001) ("Second NPRM").

(1) why we need strong EEO enforcement now more than ever

(2) how EEO rules can be crafted and enforced fairly, and

(3) how the Commission can ultimately put an end to discrimination in the electronic mass media, and thereby eliminate any further need for regulation in this area.

EEO compliance is essentially the only public service the Commission requests of radio stations, and one of very few public services required of television stations, cable systems and other mass media outlets. In exchange, they receive the free and protected use of the valuable radiofrequency spectrum. That is why it is essential that the Commission create new EEO regulations which the industry will respect. The new regulations must not be perceived as so innocuous that no one could ever be sanctioned for violating them. Nor should the regulations be so hair-splitting as to produce illogical or unjust results.

Equal opportunity should be sacrosanct in the law of broadcasting and cable. The full inclusion of minorities and women in the mass media has been essential to cross-cultural consciousness, to the diversity and strength of our national culture, and to the vitality of our democracy. This inclusiveness has largely been made possible by FCC equal employment opportunity regulation. By seeking to curtail the

tradition of exclusionary word-of-mouth recruitment that is so common in close-knit industries like broadcasting and cable, the Commission's civil rights policies can ensure that the mass media industries are held to the highest standards of enlightened business in providing equal opportunity.

Over the past thirty years, many broadcasters and cable operators, as well as the NCTA, came to recognize that diversity invigorates and strengthens their industries. Many wonder why they ever doubted the value of the EEO rules. The enthusiasm of so many enlightened businesspeople enables us to contemplate the elimination of discrimination and its present effects, root and branch, from the broadcasting and cable industries. But until all vestiges of a two-class system of employment are eliminated from broadcasting and cable, strong and comprehensive EEO enforcement, without qualification or equivocation, is an absolute necessity. Providing equal employment opportunity, and taking aggressive steps to remedy the consequences of decades of unequal opportunity, should be considered an honor for all broadcasters and cable operators. It is nominal consideration for their free use of spectrum.

The new EEO regulations are a nondiscrimination-promoting and discrimination-avoidance program. They disallow the use of race and gender in hiring decisions while ensuring that all qualified persons, including minorities and women, can learn of job openings. They contain carefully crafted, race- and gender-neutral procedures which will prevent both intentional and unintentional discrimination.

Thus, we regard the new proposed regulations as a generally reasonable way to satisfy the sometimes conflicting concerns of Congress and the courts. The new regulations are

generally designed to afford broadcasters and cable operators wide latitude on how to recruit, as long as the methods chosen would not exclude minorities and women from learning about job openings. The rules

neither call for nor embed any secret quota or set-aside, and the rules expressly require that no special consideration be given to any job applicant on the basis of race or gender.

The Commission's role in EEO enforcement is justified to prevent discrimination, remedy past discrimination, promote competition, and promote diversity of viewpoints within stations and among stations. The proposed rules would help ensure that all Americans have access to the instruments of mass communications -- the most powerful force for democracy in the nation. In this way, the proposed rules can help ensure that the public has available the widest possible range of ideas and expression.

In addition to demonstrating why the rules are needed, our Comments recommend the following improvements:

1. The Commission should require top management to be personally involved in EEO implementation.[2/]

2. Regulatees should certify that they do not rely primarily on word-of-mouth recruitment. Word-of-mouth recruitment, if done, should be performed on an equal opportunity basis. Broad recruitment should commence no later than word-of-mouth recruitment commences.[3/]

3. Regulatees should report and update discrimination complaints currently and completely, including complaints handled through arbitration.[4/]

2/ See pp. 69-72 infra.

3/ See pp. 72-74 infra. Reporting procedures attendant to this proposal are discussed at p. l45 infra.

4/ See pp. 75-78 infra.

4. The use of minority and female recruitment sources is permissible in order to expand rather than transfer opportunity.[5/]

5. Regulatees should be expected to cultivate outreach sources besides those customarily notified.[6/]

6. The Commission can authorize a very narrow and exceedingly rare "emergency exception" to the rule that broadcasters and cable operators should recruit for each vacancy.[7/]

7. Each outreach activity should be open to the general public, rather than restricted to a regulatee's employees' relatives, friends, or trade group members.[8/]

8. Passive Internet postings should not be a primary recruitment mechanism until the industry substantially upgrades its job sites to provide universal posting by broadcasters and interactivity with those in the job market.[9/]

9. EEO compliance credit should be afforded for three additional types of activities: (a) sponsorship of a nonprofit website, independent of the industry and focused on broad outreach; (b) equal employment opportunity training; and (c) training recruitment sources' job placement coordinators.[10/]

10. The Commission can hold the annual employment reports in confidence for three years, thereby preserving their value for

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5/ See pp. 79-84 infra.

6/ See pp. 84-86 infra.

7/ See pp. 87-96 infra.

8/ See pp. l02-l03 infra.

9/ See pp. l04-l5 infra.

l0/ See pp. ll6-l9 infra.

scholarship while rendering them valueless for advocacy of race-conscious hiring.[11/]

11. The issue of how to handle annual employment reports should be severed from this proceeding and considered in a separate docket.[12/]

12. EEO program elements should be reported retrospectively and applied prospectively.[13/]

13. Regulatees should retain nonracial data matching vacancies, applicants and interviewees to recruitment sources.[14/]

14. Rather than having to maintain EEO outreach records in their public files or on their websites, regulatees should post the records on the Commission's website.[15/]

15. The Commission should expand the duties of the EEO Branch to include research, and outreach to regulatees and the public.[16/]

These proposals are effective, constitutional and fair means of bringing about full equal employment opportunity in the electronic mass media within our lifetimes. We commend these proposals to the Commission and to all stakeholders, including representatives of business and labor, for their consideration and endorsement.

11/ See pp. 131-35 infra.

12/ See pp. 135-36 infra.

l3/ See p. l37 infra.

l4/ See pp. l37-45 infra.

l5/ See pp. l46-47 infra.

l6/ See pp. l48-49 infra.

Foreword: The Pollak Letter, And Why We Are Here

When the Commission proposed the first EEO rules in 1968 and adopted them in 1969, it relied to a great extent on the "Pollak Letter", discussed substantively at p. 19 n. 60 and p. 31 infra. These words by Stephen Pollak 34 years ago are just as timely today:[17/]

> [An] argument against the proposed rule might be that the Commission should concern itself with broadcasting, and not with matters of racial or other discrimination. In view of the national policy against such discrimination, the critical importance of reducing it as soon as possible, and the responsibility of the Commission has to encourage and require the broadcasting industry to serve the public interest, I do not believe that this contention should be given substantial weight.
>
> Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries. For these reasons I consider adoption of the proposed rule, or one embodying the same principles, a positive step which your Commission appears to have ample authority to take....
>
> Sincerely,
>
> Stephen J. Pollak
> Assistant Attorney General,
> Civil Rights Division,
> Department of Justice,
> Washington, May 21, 1968.

17/ Letter to Hon. Rosel H. Hyde, Chairman, Federal Communications Commission, from Stephen J. Pollak, May 21, 1968 (the "Pollak Letter"), reprinted in Nondiscrimination in the Employment Practices of Broadcast Licensees (MO&O and NPRM), 13 FCC Rcd 766, 776-77 (1968) ("1968 EEO MO&O and NPRM"); see

also id. at 771 (discussing the Pollak Letter) and Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices (R&O), 18 FCC2d 240, 241 (1969) ("1969 EEO R&O") (relying on the Pollak Letter in adopting final rules.)

The forty-five organizations whose names appear on the cover ("EEO Supporters") are privileged to offer these Comments in response to the Second NPRM.[18/]

EEO Supporters' Interest In This Proceeding

The EEO Supporters are among nation's leading nonprofit minority, civil rights, religious and educational institutions and organizations. Many of the EEO Supporters and their representatives have been involved in the EEO rulemaking and adjudication process since 1969, when Commission adopted its first EEO rules[19/] as a result of a petition for rulemaking filed by one of the EEO Supporters, the Office of Communication of the United Church of Christ.[20/]

The Commission's EEO policies are universally credited with opening the electronic media to minorities and women. However, in 1998, after almost three decades of noncontroversial operation, a panel of the D.C. Circuit of the U.S. Court of Appeals, applying strict scrutiny, struck the recruitment portion of the regulations

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18/ The views expressed in these Comments are the institutional views of the commenting organizations, and are not intended to reflect the individual views of each officer, director or member of these organizations.

19/ 1969 EEO R&O, supra; see also Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340 and 342 (R&O), 32 FCC2d 708 (1971) ("1971 EEO R&O") (including nondiscrimination by gender in EEO rules).

20/ See 1968 EEO MO&O and NPRM, supra, 13 FCC2d at 766 et seq.

in the Lutheran Church case.[21/] The Commission then proposed new regulations.[22/] In response, the EEO Supporters filed 339 pages of Comments, supplemented by a research study on EEO compliance and by the testimony of 22 witnesses.[23/]

The Commission adopted final rules in 2000.[24/] Those rules were rejected in part in the MD/DC/DE Broadcasters case.[25/]

21/ Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.) ("Lutheran Church"), petition for rehearing denied, 154 F.3d 487 ("Lutheran Church (en banc)"); petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998). The Court in Lutheran Church held that the rules then in effect were unconstitutional because they "pressure - even if they do not explicitly direct or require - stations to make race-based hiring decisions." The Court added that "[i]f the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated." Id., 141 F.3d at 351. The Court added it did not hold that a regulation "encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny." Lutheran Church (en banc), supra, 154 F.2d at 492.

22/ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (NPRM), 13 FCC Rcd 23004 (1998) ("First NPRM").

23/ Comments of EEO Supporters in MM Docket No. 98-204, filed March 5 and 19, 1999 ("1999 EEO Supporters Comments"). The 1999 EEO Supporters are slightly different in composition from the EEO Supporters commenting today. Nonetheless, each group of organizations is referred to here as "EEO Supporters" for convenience and to avoid confusion. The 1999 EEO Supporters Comments, Reply Comments, and other filings in this docket are incorporated herein by reference in their entirety and are discussed at various places herein. See Order, DA 02-400 (released February 22, 2002).

24/ Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies (R&O), 15 FCC Rcd 2329 (2000) ("First R&O"), recon. denied, 15 FCC Rcd 22548 (2000) ("Recon.")

25/ MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13 ("MD/DC/DE Broadcasters"), petition for rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001) ("MD/DC/DE Broadcasters (en banc)"), cert. denied sub nom. MMTC v. FCC, ___ U.S. ____, 122 S.Ct. 920 (2002).

The core issue in MD/DC/DE Broadcasters was whether the Commission could design an outreach program that expands opportunities for minorities without disadvantaging nonminorities -- a problem that is not insoluable.[26/] This proceeding addresses that problem, as well as more routine issues arising in EEO regulation.

I. The Record In This Docket Contains Several Key Facts And Conclusions That Should Remain Undisturbed

Quite properly, the Second NPRM did not reopen each and every question addressed in the First R&O, including many of the constitutional and enforcement issues. Most of the findings and conclusions in the First R&O are unaffected by MD/DC/DE Broadcasters. Absent some extraordinary new development, these findings and conclusions should remain undisturbed.[27/] As shown infra, most issues decided in the First R&O are unaffected by subsequent developments, or they are the law of the case.

26/ Id., 253 F.3d at 739 (dissenting from the denial of rehearing en banc, Judges Tatel, Edwards and Rogers noted that "[d]etermining whether an outreach program crosses the line from expanding opportunities for minorities to disadvantaging nonminorities, thus triggering strict scrutiny - and if so whether the program survives - are difficult issues that neither we nor the Supreme Court has yet considered.")

27/ See Second R&O, supra, 16 FCC Rcd at 22850 ¶21 ("we do not intend to modify the rules in a way that would compromise our goal of ensuring broad and inclusive outreach in the community for virtually all full-time job vacancies [or] in any respect that would make it vulnerable to attack on constitutional or statutory grounds.") Most facts and

conclusions in the First R&O should remain undisturbed because they played no part, even as a contributing factor, in the Court's decision to strike the rules. The rules were stricken in their entirety only because the Court believed it could not sever the portion it regarded as unconstitutional. The Court believed that severing Option B "would severely distort the Commission's program and produce a rule strikingly different from any the Commission has ever considered or promulgated." MD/DC/DE Broadcasters, supra, 236 F.3d at 23.

Therefore, these Comments address only matters arguably implicated by MD/DC/DE Broadcasters, and a few matters not decided in the First R&O. Constitutional questions that must be answered in connection with a new substantive proposal are addressed in Section IV.[28/] Constitutional and other threshold questions which are closed are discussed only briefly below.

1. Has Congress given the Commission the authority or obligation to develop and maintain EEO regulations? The answer is yes. Congress has repeatedly called upon the Commission to act aggressively to bring about equal opportunity in the broadcasting and cable industries.[29/] Recently, in by amending Section 151 of

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28/ See pp. 54-61 infra.

29/ Congress was aware of the discrimination against minorities in broadcasting and cable when it ratified and required extension of the Commission's rules. For example, Congress required EEO rules for the cable industry in passing the Cable Communications Policy Act of 1984. See Pub. L. No. 87-549 §2, 98 Stat. 2279, 2797 (1984), codified as amended as 47 U.S.C. §554(c) (1994). A House Report to the 1984 Act noted that "while the employment record of the cable industry has improved in the years since the Commission first adopted equal employment opportunity regulations, women and minorities still are significantly underrepresented as employees and owners in the industry," particularly in the upper categories of employment. H.R. Rep. No. 98-934, at 85 (1984), reprinted in 984 U.S.C.C.A.N. 4655, 4723. In the Cable Television Consumer Protection and Competition Act of 1992, Congress barred the Commission from revising its then-existing EEO rules governing "television broadcast station licensees and permittees...." Pub. L. No. 102-385, 1065 Stat. 1460 (1992), codified as amended at 47 U.S.C. §334(a)(1). Congress supported this requirement by finding in §22(a) of the 1992 Act that:

(n. 29 continued on p. 5)

the Communications Act[30/] and by enacting Section 257[31/] of the Telecommunications Act, Congress manifested its expectation that the Commission will ensure that broadcasters and cable companies do not discriminate, and that the Commission will eliminate barriers to entry -- including the ultimate barrier to entry, race and

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29/ (continued from p. 4)

> (1) despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant positions of management authority in the cable and broadcast industries.
>
> ... and
>
> (3) rigorous enforcement of equal opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.

106 Stat. at 1498 (emphasis added).

30/ The first sentence of the Communications Act, which creates the FCC, provides that the agency exists, inter alia, "so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" (emphasis added). The emphasized words were added in the Telecommunications Act of 1996; the codified language appears in the Communications Act as 47 U.S.C. §151 (1996).

31/ Section 257 of the Communications Act, codified at 47 U.S.C. §257 (1996), directs the Commission to complete a rulemaking proceeding "for the purpose of identifying and eliminating...market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services...." 47 U.S.C. §257(a). It establishes a "National Policy" under which the Commission shall promote "diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity."

47 U.S.C. §257(b). Congress also expects the Commission to report, every three years, on "any regulations prescribed to eliminate barriers within its jurisdiction...." 47 U.S.C. §257(c).

gender discrimination.[32/]

In MD/DC/DE Broadcasters, the state associations contended that Congress had not required the Commission to adopt the specific rules contained in the First R&O;[33/] however, the Court failed to address this issue. No new facts have since arisen that require relitigation of this point; it is preserved for subsequent appeals and there is no need for additional briefing now.

2. Can equal opportunity for women and minorities, and the inclusion of women and minorities in business, be valid objectives

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32/ The Commission has already begun to apply Section 257 principles to issues like EEO enforcement. See Streamlining of Mass Media Applications, Rules and Processes, and Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (Report and Order), 13 FCC Rcd 23056, 23098 ¶102 (1998) (observing that "[t]o the extent that a lack of employment opportunities in the broadcast industry deprives minorities of employment or management experience and thereby erects barriers to entry into the industry, our action today will help us to fulfill our mandate under Section 257 to identify and eliminate those barriers and foster a diversity of media voices"); Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (NOI), 11 FCC Rcd 6280, 6306 ¶38 (1996) ("[r]ace or gender discrimination in employment may impede participation and advancement in the communications industry. Employment provides business knowledge, judgment, technical expertise, and entrepreneurial acumen, and other experience that is valuable in attaining ownership positions.")

Pursuant to Section 257, a study commissioned by the FCC addressed the nexus between EEO regulation and market entry barriers. Ivy Planning Group, "Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast And Wireless Licensing, 1950 to Present" (2000). The study found that for minority and women

licensees, market entry barriers were exacerbated by the discrimination minorities and women have faced in the capital markets, in the advertising industry, in broadcast industry employment and in the broadcast station transactional marketplace -- and as a consequence of various actions and inactions by the Commission, including weak EEO enforcement.

33/ Brief for Appellants, 50 Named State Broadcasters Associations, in MD/DC/DE Broadcasters Ass'n. v. FCC, No. 00-1094 (D.C. Cir.), filed June 9, 2000 ("State Associations' Main Brief") at pp. 51-53.

of government? In Lutheran Church (en banc), the Court essentially rejected the argument that government can have no such objective.[34/] In the First R&O, the Commission noted that women

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34/ Lutheran Church (en banc), 154 F.3d at 492 ("the fact of encouragement [of minority hiring]...does not mean that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny.") That view is consistent with well settled law. See Washington v. Davis, 426 U.S. 229 (1976) (holding that a race-neutral law with a disparate impact on racial minorities was subject to strict scrutiny if, and only if, the law was enacted with a discriminatory purpose.) On the other hand, strict scrutiny is triggered when a governmental decision is shown to have been motivated in part by a discriminatory purpose, even if other motivations played an equal or greater role. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977).

Remedying discrimination, proscribing discrimination, preventing discrimination, promoting competition and promoting diversity are not discriminatory purposes. Moreover, doing these things in a way that expands opportunities for minorities while not diminishing opportunities for nonminorities does not signal that there is a discriminatory purpose. In Personnel Administrator v. Feeney, 442 U.S. 256 (1979) ("Feeney"), the Court upheld a state law giving a preference to veterans for civil service employment, which had a significant discriminatory effect against female applicants. Notwithstanding the obvious impact of the preference, the Court upheld it on the ground that "'[d]iscriminatory purpose,' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker...selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'" 442 U.S. at 279 (citation omitted; emphasis added). Although Feeney involved sex discrimination, the test announced in Feeney that determines whether a purpose is "discriminatory with respect to a particular trait" has also been applied to claims of race discrimination. See, e.g., Hernandez v. New

York, 530 U.S. 352, 360 (l99l) (citing Feeney, 442 U.S. at 279).

The Commission's proposed new regulations are not designed to have any "adverse effects upon an identifiable group"; indeed, they are designed not to have any such effects. Therefore, under the analysis in Feeney, strict scrutiny should not apply. As Justice O'Connor wrote for the plurality in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509-l0 (l980):

(n. 34 continued on p. 8)

and minorities have not enjoyed equal opportunity, and the Commission expressed its desire for an integrated industry.[35/] Two

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34/ (continued from p. 7)

> the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race.

Concurring in the judgment, Justice Scalia wrote that "[a] State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race....Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks." Id. at 528.

Even if strict scrutiny applied, the EEO rules would still be constitutionally valid because the interests of proscribing, preventing and remedying discrimination, and promoting competition are compelling, and the means chosen (race-neutral broad outreach) is the least intrusive and most narrow means possible. See pp. 54-61 infra.

35/ See First R&O, supra, 15 FCC Rcd at 2363 ¶76 ("women and minorities have historically experienced difficulties in finding out about, or taking advantage of, employment opportunities in the communications industry"); id. at 2332 ¶4 ("if the group of people who make programming decisions...come from a wider variety of backgrounds with a greater range of

human experience and social interactions, their programming decisions will better reflect the diversity of viewpoints in our pluralistic society than would programming decisions made by a homogeneous workforce.")

commissioners expressed similar views in the Second NPRM.[36/] On both occasions, the Commission acted only by adopting or proposing regulations regarded by the majority of commissioners as race-neutral.[37/]

On appeal, the state associations accused the Commission of having "expressed its disdain [!] for 'homogeneous' station workforces and station staffs where 'minorities and women are poorly represented,'"[38/] and argued that individual broadcasters, essentially, would reverse-discriminate based on their knowledge that the government hopes for an integrated industry.[39/]

36/ Second NPRM, supra, 16 FCC Rcd at 22872 (Separate Statement of Chairman Michael K. Powell) ("[t]he proposed EEO rules focus on increasing the possibility that more minorities and women get the opportunity to compete fairly for employment....All Americans, regardless of stripe, benefit when our workforce captures the rich talent of our great nation"); id at 22873 (Separate Statement of Commissioner Michael J. Copps) ("I have been encouraged by the responses of some broadcasters and cable companies that have continued their outreach efforts in the absence of EEO rules....Their actions have translated into positive results in building a workforce with more resemblance to our nation's diversity.")

37/ First R&O, supra, 15 FCC Rcd at 2414-15 ¶217; Second NPRM, supra, 16 FCC Rcd at 22847 ¶15.

38/ See State Associations Main Brief, supra, at 9 (citing First R&O, supra, at 2331 ¶3, 2332 ¶4, 2345 ¶40 and 2363 ¶76). It is unclear why any government agency should not "disdain" a homogeneous workforce, much less precisely how a homogeneous workforce benefits society.

39/ State Associations Main Brief at 25 ("[t]o establish that [the rules] are designed to pressure broadcasters into using racial classifications in hiring, one need look no further than at the primary justifications offered by the FCC for its

new rules. These justifications rely on claims that minority and female *employment* will (supposedly) favor the FCC's goal....The over-arching purpose of the [rules] is the desire to eliminate 'homogeneous' station workforces and staffs where minorities and women are poorly represented...[terms] each connoting the lack of a sufficient number of minorities and women employed at a station" (emphasis in original)).

Understandably, the court of appeals did not reach this argument,[40/] under whose illogic Eleanor Roosevelt, Lyndon Johnson, Sandra Day O'Connor and Michael Powell have each committed constitutional torts in public life.[41/]

In any event, there are no jurisprudential reasons to reopen this question, the record on the issue being sufficient for its possible exploration if there are subsequent appeals.

3. Can enforcement of the nondiscrimination rules in some respects be subject to zero tolerance? In the First R&O, the Commission adopted some of the zero tolerance measures recommended by the EEO Supporters.[42/] The EEO Supporters called for a stronger zero tolerance policy on the basis that the Commission is constitutionally barred from not adopting rules that aggressively and immediately put an end to the consequences of its own past ratification and validation of the discriminatory practices of its

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40/ MD/DC/DE Broadcasters, supra, 236 F.3d at 18.

41/ If the state associations' theory were accepted, Eleanor Roosevelt and the National Park Service acted unconstitutionally in providing a federal facility, the Lincoln Memorial, for Marian Anderson after the Daughters of the American Revolution in 1939 refused to allow her concert to take place at Constitution Hall. Likewise, President Johnson acted unconstitutionally in his 1965 Address to Congress when he proclaimed that "We Shall Overcome." If gender integration of courthouse staff is not an important interest, Justice O'Connor acted unconstitutionally if, as she has acknowledged (C-SPAN 2, December 10, 1998) her practice is to "try to hire a great many female clerks." And Chairman Powell acted unconstitutionally by publishing his view that it is desirable to "increas[e] the possibility that more

minorities and women get the opportunity to compete fairly for employment." Second NPRM, supra, l6 FCC Rcd at 22872 (Separate Statement of Chairman Michael K. Powell).

42/ First R&O, supra, l5 FCC Rcd at 236l-62 ¶¶7l-73.

regulatees.[43/] We also contended that it would be arbitrary and capricious not to adopt a far stronger zero tolerance approach.[44/] These issues are suitable for an as-applied challenge.[45/] Therefore, unless the Commission itself reopens the matter, we will save this issue for another day.[46/]

For their part, the state associations did appeal on the issue of whether the rules' alleged overaggressiveness is arbitrary and capricious,[47/] but they did not prevail.[48/] The state associations also contended that strict enforcement would necessarily be read by broadcasters as a command to reverse-discriminate,[49/] but the D.C.

43/ See 1999 EEO Supporters Comments, supra, at pp. 117-33.

44/ Id. at pp. 275-332.

45/ See U.S. v. Salerno, 481 U.S. 739, 745 (1987) ("[t]he fact that the [law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.")

46/ We have not entirely waived these arguments, and we expressly preserve them here.

47/ State Associations Main Brief, supra, pp. 49-51.

48/ MD/DC/DE Broadcasters, supra, 236 F.3d at 18.

49/ State Associations' Main Brief at 28-29 ("under its 'zero tolerance' enforcement policy, the FCC can reasonably be expected to commence anti-discrimination and 'misrepresentation' investigations and hearings...anytime a station's filings do not show '*enough*' minorities and women among its applicant pools or interviewee pools, anytime a station's Annual Employment Reports do not show '*enough*' minorities or women employed overall and in high enough positions, or anytime the Commission decides that a station's

representations that it has engaged in adequate affirmative action efforts are not completely accurate" and therefore the FCC's rules "pressure broadcasters into using race in making hiring decisions and are therefore subject to strict scrutiny" (emphasis in original)).

Circuit neither mentioned nor reached this issue. Consequently, under the "law of the case" doctrine,[50] the state associations are precluded from relitigating the issue of whether the zero tolerance provisions of the First R&O are arbitrary and capricious. The constitutionality of zero tolerance is preserved for any subsequent appeals, although there is no need to develop the record further on the question of whether there is some level of lawlessness that the government is constitutionally barred from prosecuting.[51]

50/ The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983). See also Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 739 (D.C. Cir. 1995) ("true law-of-the-case preclusion" occurs when the appeals court "has affirmatively decided the issue, be it explicitly or by necessary implication" (emphasis added)). The doctrine follows from the "sound policy that when an issue is once litigated and decided, that should be the end of the matter." United States v. United States Smelting Rev. & Mining Co., 339 U.S. 186, 198 (1950).

51/ Zero tolerance is hardly a new or controversial concept at the Commission. See, e.g., David R. Price, 7 FCC Rcd 6550 (1992) (tower lighting); Processing of FM and TV Broadcast Applications (R&O), 50 F.R. 19936 (May 13, 1985) (construction permit applicants required to file perfect applications under the "hard look" policy). There is no rational reason why a federal agency should accommodate any particular quantum of lawbreaking, or why a broadcaster can be heard to complain that it actually has to obey a valid broadcast regulation. Imagine an agency abandoning zero tolerance for driving drunk, selling drugs or robbing banks.

4. Can the rules mention race or gender in even a minor way? This question was raised in Lutheran Church, which in dictum suggested that perhaps there is no "de minimis" exception to strict scrutiny.[52/] The question was raised again by the state associations.[53/] However, the MD/DC/DE Broadcasters court closed the door on this argument by finding that the explicit mention of race and gender in two of the recruitment options within Option A did not trigger strict scrutiny.[54/] Consequently, this issue cannot be reopened because it is covered by the "law of the case" doctrine.[55/]

52/ Lutheran Church, supra, 141 F.3d at 351 (conceding that there is a "textual basis" under Title VII for the position that recruitment procedures are not employee selection decisions, but stating that "the Equal Protection Clause would not seem to admit a *de minimis* exception.")

53/ State Associations' Main Brief at 30 (conceding that while "the requirement to use race in recruitment under [Option A] is not stated as explicitly [as in Option B], it takes no elaborate analysis to show that the requirement exists there as well", citing Option A menu items giving credit for "co-sponsoring at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities" and "listing of each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities.")

54/ MD/DC/DE Broadcasters, supra, 236 F.3d at 119 ("[b]ecause, as the Commission points out, licenses remain free under Option A to select recruitment measures that do not place a special emphasis upon the presence of women and minorities in the target audience, we do not believe the Broadcasters are meaningfully pressured under Option A to recruit women and minorities.")

55/ See p. 12 n. 50 supra (discussing law of the case doctrine).

II. The New EEO Regulations Are Essential To The Success Of The Commission's Regulatory Mission

No more critical task faces the Commission today than that of ensuring that all Americans have access to the nation's airwaves. A broadcaster "seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; where he accepts that franchise it is burdened by enforceable public obligations."[56/] At a minimum, this means that today's broadcasters, and cable companies, should help develop the next generation of their respective industries by providing an employment marketplace free from discrimination. As Chairman Powell put it,

> The public benefits of individuals in our society having equal employment opportunities, based on merit rather than discriminatory factors, are so numerous they are impossible to list. I believe few would disagree with this proposition. Thus, it is only right and proper for this agency to expect its licensees to afford equal opportunities for everyone. Indeed, I believe it is our obligation to attempt to widen the circle of those Americans that benefit from the fruits spawned by those licenses. If the public interest means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license ultimately is derived. 57/

The Commission's long-standing policy of promoting equal employment opportunity in broadcasting has helped ensure that all Americans will have access to mass communications -- the most powerful force for democracy in the nation. In this way, the Commission has helped ensure that the public has available the widest possible range of ideas and expression.

56/ Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) ("UCC I").

57/ Second NPRM, 16 FCC Rcd at 22872 (Separate Statement of Chairman Michael K. Powell).

Outreach-based FCC EEO enforcement has been effective and fair. The Commission's EEO regulations have always required broadcasters and cable companies to hire only the best qualified persons. No one can possibly be harmed when a broadcaster or cable company recruits broadly enough to allow well qualified minorities and women to learn of job openings.

In their operation, the Commission's EEO rules have directly targeted the excessive use of word-of-mouth recruitment, the process by which friends and social associates of current employees learn of job vacancies to the exclusion of other qualified candidates. This practice, common in close knit industries like broadcasting and cable, allows homogeneous groups to replicate themselves across generations.[58/]

58/ It is well settled that recruiting by word-of-mouth from a homogeneous staff is a means of perpetuating discrimination. See First R&O, supra, 15 FCC Rcd at 2331 ¶3 ("repeated hiring without broad outreach may unfairly exclude minority and women job candidates when minorities and women are poorly represented in an employer's staff....Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogeneous workforce does not simply replicate itself through an insular recruitment and hiring process"); see id. at 2345 ¶40 (to the same effect). The courts agree. See, e.g. Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 711 (9th Cir. 1997) ("[i]t does not seem much to ask of a bidder that it get the names of firms in the designated classes, advertise to them, and consider their bids. There is much appeal to enlarging the participation of minority-owned and women-owned firms by assuring that they as well as others receive full information on opportunities to bid"); Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59, 62-63 (D.C. Cir. 1977) ("Black

Broadcasting Coalition") (criticizing station whose "contact" with potential sources of minority candidates was limited to the passive acceptance of referrals -- "waiting for them to come to it.") The Commission has long understood how word-of-mouth recruitment can be discriminatory. See, e.g., Jacor Broadcasting Corporation, l2 FCC Rcd 7934, 7940 ¶l4 (l997) (holding that over-reliance on word-of-mouth recruitment may "have the effect of discriminating

(n. 58 continued on p. l6)

Broad recruitment is widely endorsed and accepted.[59/] In MD/DC/DE Broadcasters, 52 parties and amici, including virtually every leading minority, women's and civil rights organization as well as ten broadcast companies, the NCTA, AFTRA and the National Council of Churches, supported the Commission's 2000 regulations and particularly their emphasis on broad recruitment.

58/ (continued from p. 15)

against qualified minority groups or females"); Walton Broadcasting, Inc. (KIKX, Tucson, AZ) (Decision), 78 FCC2d 857, 875, recon. denied, 83 FCC2d 440 (1980) ("Walton") (holding that station used "employment practices which discriminated against minority groups in recruitment and employment" including "'word of mouth' referral from a predominately white work force, which, while unintended, effectively discriminated against minority group employment"); see also William H. Schuyler, 44 RR2d 559 (1978), and Triple R, Inc., 42 RR2d 907, 908 (1978). In 1994, the Commission rendered findings on word-of-mouth recruitment after a thorough inquiry undertaken at Congress' request. Implementation of the Commission's Equal Employment Opportunity Rules (Report), 9 FCC Rcd 6276, 6314-15 ¶79 (1994) ("1994 EEO Report") ("there continues to be evidence...that minorities are still not recruited for a significant number of positions....in many of these cases...positions were filled without any recruitment having taken place. Given the foregoing, we believe that a continuing need exists for EEO enforcement in the communications industry.") (fn. omitted). The record in this docket further underscores the discriminatory role of word-of-mouth recruitment. See 1999 EEO Supporters Comments, supra, pp. 63-72; also, id. at Vol. IV, Exhibit 2 (Statement of Thomas Castro, CEO, El Dorado Communications, Houston) ("this is an industry that is rather insular and people hire those they know....Most positions get filled so fast, that if a person does not know someone in the industry,...you are never going to find out about job openings....Minorities are generally not wired into that network of people"); Exhibit 3 (Statement of Don Cornwell, CEO, Granite Broadcasting Co., New York City) ("word of mouth recruitment is very significant in the broadcast

business....if a company is not ethnically diverse at the outset, the word of mouth process can be detrimental to minorities seeking the new full time jobs.")

59/ Second NPRM, supra, 16 FCC Rcd at 22847 ¶15 ("[b]road outreach in recruitment practices will ensure fairness to all potential applicants, including all races and both genders, without infringing on the rights of any group.")

Since 1971, neither Congress nor the Commission has wavered in their support for EEO regulations based on broad recruitment. The Commission has quite properly proposed to continue its efforts to prevent and proscribe discrimination.

A. An individual's ability to pursue broadcast and cable employment without discrimination is entitled to the highest degree of federal protection

Since 1969, preventing discrimination in broadcasting has been noncontroversial. Thus, the following unexplained statement in the MD/DC/DE Broadcasters panel opinion requires attention:

> it is far from clear that future employment in the broadcast industry is a public benefit for which the Government is constitutionally responsible. 60/

Dictum in civil rights cases sometimes becomes decisional in subsequent cases. Thus, it is essential that the Commission grapple now with what the Court meant, and make plain what the Commission's rules mean. By doing so, the Commission can avoid more confusion in the event the new rules are judicially reviewed.

The Court's phrase "constitutionally responsible," which has been used in this context in no other reported decision, apparently meant that the government is obliged, or is at least permitted, to protect a constitutional right. But if the Court meant to suggest that the "public benefit" afforded by the EEO regulations is literally "future employment in the broadcast industry," the Court must have misunderstood the

regulations. The EEO regulations adopted in l97l, those adopted in 2000, and those now under discussion create neither an entitlement to nor an expectation of

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60/ MD/DC/DE Broadcasters, supra, 236 F.3d at 2l.

"future employment in the broadcasting industry." The regulations are at least three times removed from that. Instead, the regulations prevent discrimination, in the future, from interfering with an individual's (1) opportunity to learn of, (2) apply for, and (3) be considered on a nondiscriminatory basis for "future employment in the broadcasting industry." The regulations imply no promise of actual employment; instead, they only proscribe intentional discrimination in the manner of Title VII. Further, apart from their ban on intentional discrimination, the regulations do not imply even a promise that an application for employment will be considered. Thus, the "public benefit" being delivered by the EEO rules is not a future job: it is the future opportunity to compete with other candidates without enduring discrimination while seeking a job. Chairman Powell got this exactly right:

> [t]he proposed EEO rules focus on increasing the possibility that more minorities and women get the opportunity to compete fairly for employment. No one is entitled to rewards they did not earn. No one is entitled to jobs for which they are not qualified. But, *everyone* is entitled to an equal opportunity to vie for those rewards and compete for those jobs. The proposed outreach program provides for the simple opportunity to compete for employment vacancies. All Americans, regardless of stripe, benefit when our workforce captures the rich talent of our great nation. 61/

There can be no doubt that this opportunity to compete for broadcast and cable employment without discrimination is at least as entitled to constitutional protection as the

opportunity to compete for employment in any other industry that uses public property. That is clear from the Burton case, which the D.C.

61/ Second NPRM, supra, 16 FCC Rcd at 22872 (Separate Statement of Chairman Michael K. Powell) (emphasis in original).

Circuit panel cited in the course of making its observation about "future employment in the broadcasting industry."[62/] Burton involved a segregated, privately owned restaurant located in a building owned by the Wilmington, Delaware Parking Authority. The restaurant, like a broadcaster, held a revocable authorization to use government-administered property. The Burton Court unequivocally held that segregation by a restaurant using public land easily amounted to "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."[63/]

If future equal employment opportunity is constitutionally protected at a restaurant, surely it is also protected at a broadcast station.[64/] Broadcasting holds a special place in society -- defining and transmitting culture, protecting and enhancing our democracy. As the Commission has noted,

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62/ Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) ("Burton").

63/ Id. at 724. It is noteworthy that in proposing its EEO regulations in 1968 and adopting them in 1969, the Commission relied heavily on the Pollak Letter, supra, which in turn relied substantially on Burton. See 1968 EEO MO&O and NPRM, supra, 13 FCC2d at 771 (citing the Pollak Letter); id. at 775-77 (text of Pollak Letter, which states in pertinent part that "the use of the public domain would appear to confer upon broadcast licensees enough of a 'public' character to permit the Commission to require the licensee to follow the constitutionally grounded obligation not to discriminate on the grounds of race, color, or national origin. (See, *Burton*

v. Wilmington, 365 U.S. 715 (1961)"). See also 1969 EEO R&O, supra, 18 FCC Rcd at 241 (citing the Pollak Letter).

64/ Indeed, preventing race discrimination in any industry, even one lacking any direct federal connection, is regarded as a government interest of the "highest priority." Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976).

> [w]hile Congress has not required all employers to engage in such outreach efforts, it was not unreasonable for it to require that television licensees and cable operators, who are granted the exclusive use of valuable public property, reach out to members of all races when recruiting, as Congress did in enacting sections 334 and 634. It was reasonable for the Commission to require no less for licensees of radio stations. 65/

Preventing discrimination has long been among the primary goals of FCC EEO regulation.[66/] It is the principal objective of the new set of proposed rules.[67/] That objective is entitled to the greatest constitutional respect.

Finally and briefly, we address the argument that preventing discrimination in broadcasting is not entitled to much respect, constitutional or otherwise, because -- some believe -- most broadcast personnel do not encounter discrimination.[68/] While some job applicants and employees will not face discrimination, most will encounter it, either as a victim or as a beneficiary. The

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65/ Brief for the Federal Communications Commission and the United States of America in MD/DC/DE Broadcasters Ass'n. v. FCC, No. 00-1094 (D.C. Cir.) (filed July 14, 2000) at 53.

66/ See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices (Report and Order), 23 FCC2d 430, 433 (1970) ("1970 EEO R&O") (discrimination prevention procedures "make the broadcaster focus on the problem.") The Second Circuit spoke favorably of this rationale in 1976: "[n]o matter how informal a station's procedures, the requirement that it periodically think about its EEO efforts seems wholly reasonable." UCC III, supra, 560 F.2d at 534. Even when the Commission unwisely proposed to cut back on EEO enforcement in 1996, it recognized that in addition to other worthy objectives, an "underlying rationale for the EEO rule [is] deterence [sic] of unlawful discrimination." Streamlining

Broadcast EEO Rules and Policies (NPRM), 11 FCC Rcd 5154, 5156 ¶3 (1996) ("EEO Streamlining NPRM").

67/ Second NPRM, supra, 16 FCC Rcd at 22847 ¶15.

68/ Later in these Comments, we discuss the big lie that broadcasters never discriminate. See pp. 35-47 infra.

math is straightforward. Conservatively, suppose that only 10% of broadcasters are discriminators -- about half the proportion observed in other industries through "testing" studies.[69/] Assume that a job applicant randomly sends several applications to a large population of employers, and 10% of the employers discriminate. If N is the number of applications filed by this job applicant, and D is the proportion of employers who discriminate (which we are imputing at 0.1) the probability that at least one among N applications will land on the desk of a discriminator is $1-(1-D)^N$. Thus, if the job applicant files just seven applications, there is at least a 50% chance that at least one of the applications has landed on the desk of a discriminator. If she files just fifteen applications, there is at least a 80% chance that at least one of the applications has landed on the desk of a discriminator.[70/]

On its face, this is an intolerable disadvantage to the job applicant; if the applicant is a beneficiary of discrimination, it is an intolerable benefit to her.[71/] These are not odds one would like to encounter, or have one's spouse or children encounter in the job market.

69/ See p. 39 n. 109 infra.

70/ She would probably never know this. That is one reason why so few discrimination cases are ever brought, and why it is illogical to infer that infrequent FCC EEO decisions must

mean the industry isn't discriminating. See discussion at pp. 35-47 infra.

7l/ If D is more realistically set at 0.2 (i.e., 20% of employers are discriminating, as the testing studies show), then if the job applicant files just three applications, there is at least a 50% chance that at least one of the applications has landed on the desk of a discriminator. If she files just seven applications, there is at least a 80% chance that at least one of the applications has landed on the desk of a discriminator.

B. Nondiscriminatory broadcast and cable employment helps remedy the consequences of the Commission's long history of deliberately subsidizing, ratifying, validating and rewarding discrimination by its licensees

An exhaustive record in this proceeding documents that throughout most of its history, the Commission systematically facilitated intentional discrimination by its licensees.[72/] Indeed, the weight and sufficiency of the evidence of the Commission's assistance to discriminators and suppression of

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72/ Even after Brown v. Board of Education, 357 U.S. 483 (1954), the Commission routinely granted and renewed licenses of broadcasters that discriminated, and in doing so openly embraced state segregation laws. See, e.g., Southland Television Co., 10 RR 699, recon. denied, 20 FCC 159 (1955), in which the Commission awarded a VHF-TV license to a segregationist so rabid that he built one-story movie theaters to evade Louisiana's law requiring theater owners to admit blacks to one floor of a two-story theater. The Commission justified its action by declaring that "[a]dmission of Negroes [only] to theatre balconies appears to be legal in Louisiana." Id. at 750. See also UCC I, supra, 359 F.2d at 994 et seq. (requiring the Commission to hold a hearing on allegations that WLBT-TV, Jackson, MS, discriminated against blacks in programming) and Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) ("UCC II") (vacating WLBT-TV's license renewal after the Commission held a sham hearing). Segregation in broadcast education denied minorities an opportunity to obtain broadcast experience and a record of broadcast operation, yet the Commission still credited these factors when awarding broadcast licenses in comparative hearings. Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393, 396-98 (1965). Finally, the Commission did not repeal an overbroad broadcast financial requirement until 1981, when it recognized that the former rule prevented minorities from securing broadcast licenses. New Financial Qualifications Standards for Broadcast Assignment and Transfer Applicants, 87 FCC2d 200, 201 (1981) (repealing Ultravision Broadcasting Company, 1 FCC2d 545, 547 (1965)). A thorough discussion of this history can be found in the 1999 EEO Supporters Comments, supra, at pp. 97-133, and in the Comments of MMTC in MM Docket No. 01-317 (Multiple

Ownership of Radio Broadcast Stations in Local Markets) (filed March l9, 2002) ("MMTC Local Radio Ownership Comments") at pp. 7l-l04.

minority participation, well into the time period where present-day effects remain powerful, is a proper subject of official notice.[73/] It is black letter law that the government is prohibited from using tax revenues to facilitate discrimination,[74/] and that the government is permitted, even under strict scrutiny, to remedy the consequences of its own facilitation of discrimination.[75/] The purpose of such remediation is not to repay a debt; it is to

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73/ See, e.g., United Steelworkers of America v. Weber, 443 U.S. 193, 198 n. 1 (1979) (holding that "judicial findings of exclusiveness from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice.") See also Oregon v. Mitchell, 400 U.S. 112, 133 (1970) (unanimously upholding ban on literacy tests where Congress had "substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement.")

74/ Government has a "compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." Croson, supra, 488 U.S. at 492. See also Bob Jones University v. United States, 461 U.S. 574, 595 (1983) (holding that government should not encourage educational institutions that practice racial discrimination "by having all taxpayers share in their support by way of special tax status"); Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1165 (10th Cir. 2000), cert. dismissed as improvidently granted, 534 U.S. 103 (2001) (defining the applicable compelling governmental interest as "not perpetuating the effects of racial discrimination in [the government's] own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by [government] disbursements.")

75/ See Adarand Constructions, Inc. v. Peña, 515 U.S. 200, 237

(1995) ("Adarand III") ("the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.") See also Shaw v. Hunt, 517 U.S. 899, 909 (1996) ("remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions.")

ameliorate the lingering consequences of past discrimination on the career prospects of those living today.[76/]

The Commission's proposed EEO regulations do not need to be justified as remedial, since the regulations are race-neutral. But the fact is that there is much to remedy. These regulations are remedial -- and the Commission should say so.

C. Nondiscriminatory broadcast and cable employment promotes competition by eliminating market entry barriers facing small businesses

The competitiveness of the broadcasting and cable industries depends greatly on the full participation of all groups in society. When a significant group is unable to effectively contribute its competitive acumen to the marketplace, the public is denied the full range of products and services that the marketplace otherwise would provide. Goods and services -- including broadcast and cable programming -- can be produced more efficiently, and at lower cost, when the service provider does not artificially restrict the supply of any raw material -- including labor.[77/]

76/ Most minorities today inherited disadvantages from prior generations who suffered direct discrimination. See David A. Strauss, "Affirmative Action and the Public Interest," 1995 Sup. Ct. Rev. 1, 31 (1995) ("[a] person might be subject to the effects of past discrimination even if he himself has never been the victim of a specific act of discrimination, or has not been discriminated against for decades. Discrimination at an earlier time (or even discrimination against earlier generations) can leave people without the resources, particularly human capital resources, needed to compete - education, experience, reputation, contacts.")

77/ The economic cost to society when a discrimination victim does not earn the true value of her labor may be measured in foregone tax revenues, social service costs and lost productivity.

(n. 77 continued on p. 25)

The EEO rules promote competition in three ways: (1) they help eliminate artificial restraints on the supply of the key input to production; (2) they improve the survivability and strength of competitive firms; and (3) they improve the industry's reputation among consumers and the labor force. We discuss these in turn.

1. EEO rules help eliminate artificial restraints on the supply of the key input to production. In any industry, the irrational exclusion of any input to production distorts the marketplace, reduces the quantity and quality of outputs, drives up prices and leaves consumer demand unsatisfied. In the electronic media, the most critical input into production is the employees. Their collective talent and creativity are what makes broadcasting and cable competitive with other media industries. The diversity of the employee pool is an especially critical input in the broadcasting industry, which requires an ever-growing stream of

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77/ (continued from p. 24)

These costs are staggering. Dr. Andrew Brimmer, an economist and a former member of the Federal Reserve Board has quantified the economic costs of discrimination. See A. Brimmer, "The Economic Cost of Discrimination against Black Americans," in M.C. Simms, ed., Economic Perspective on Affirmative Action (Joint Center for Political and Economic Studies, 1995) at 11-29. Dr. Brimmer calculated that the inefficient use of African Americans' productive capacity was costing the economy (in 1995) about $138 billion annually. That was about 2.15 percent of the gross national product. Id. at 12.

creative people on the line staff and in management.[78/] In a business such as broadcasting, whose product is the distribution of the fruits of talent, it is unsound economic policy to allow major market imperfections to exclude or drive out anyone on a basis other than merit. If an employer, either through her own discrimination or as a consequences of the discrimination of others,[79/] has fewer candidates from which to choose for a position, she is likely to select a less optimal person and (given

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78/ An argument can be made that this principle applies in industries like radio and television, journalism, movies, music, sports, medicine, education and law, each of which depend heavily on human talent -- but not necessarily in industries whose primary inputs in production are natural resources such as electricity. For example, in NAACP v. FPC, 425 U.S. 662 (1976), the NAACP had asked the Court to find that EEO rules in the power industry, similar to the FCC's broadcast EEO rules, would make the power industry more competitive. While denying relief on the record before it, the Court did note that, at least in theory, one of the potential (albeit in this instance unquantifiable) rationales for a nondiscrimination rule affecting power companies could be "excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against." Id. at 667. In dictum, the Court also declared that the FCC's mandate to promote diversity justified its EEO regulations, while not discussing whether the FCC's EEO rules could also have been justified as a means of promoting the competitiveness of the broadcasting industry. Id. at 670 n. 7.

79/ Discrimination pollutes the entire pond. Those subject to discrimination do not develop to their full potential, or they become discouraged and leave the industry, or they never enter it in the first place. Consequently, the number of persons available for employment at any firm, and the qualifications of those persons, inevitably are depressed by the second-order consequences of discrimination practiced by

other firms. That is especially true in an industry such as broadcasting, in which career employees frequently move from one firm to another and to and from competing industries like the Internet and telecommunications. See pp. 97-102 infra (discussing the broadcast career ladder's tracking from small employers or small markets to large employers and large markets.)

the reduced labor supply available to her) she will pay more to secure this person's services.[80/]

The Commission has not heretofore considered the impact of EEO rules on the supply of the industry's key input in production. However, in his separate statement accompanying the Second NPRM, Commissioner Martin captured this issue perfectly:

> by expanding their recruitment sources, broadcasters and cable entities, including multi-channel video programming distributors, are more likely to find the best-qualified candidate. And when broadcasters and cable entities have a more talented workforce, we all reap the benefits (emphasis supplied). 81/

As we have shown, minority participation in broadcasting has been depressed by government action and inaction, as well as by societal discrimination.[82/] But whatever its causes, the resulting nonparticipation of minorities is inefficient as a means of organizing production in a business uniquely based on talent. Since talent is equally distributed throughout society, the nonparticipation of large sectors of society in broadcasting is

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80/ Those who complain about the supposed high cost of filling out EEO forms should calculate how much more they pay for labor, and how much less value they receive from suboptimal employees, because minorities and women are not fully utilized in the broadcasting industry. See p. 24-29 supra.

81/ Second NPRM, supra, 16 FCC Rcd at 22875 (Separate Statement of Commissioner Kevin Martin).

82/ See pp. 22-24 supra.

inherently inefficient. Whether or not it is anticompetitive, it is macroscopically noncompetitive.[83/]

2. EEO rules improve the survivability and strength of competitive firms. Greater minority broadcast employment, which is predictable in the wake of strong equal opportunity measures, would strengthen the competitiveness of the radio industry by improving the prospects for more minority owned stations. Broadcast experience is the key to eventual ownership.[84/] More minority owners would mean an increase in the number of radio stations which are operating successfully, staying on the air, and serving the public. More minority owners would create jobs that would not exist but for minority entrepreneurs who are empowered to use their unique skills and backgrounds to compete in the marketplace.[85/] More minority owners would also reach heretofore underserved minority audiences, thereby enhancing the ability of advertisers to reach the entire public.[86/]

83/ The impact of racial exclusion on competitiveness has been well established by DOD's pioneering and highly successful work in promoting racial inclusiveness. The Army's aggressive efforts to stay competitive by ending segregation and ensuring full integration at all levels is described in Charles C. Moskos and John Sibley Butler, All That We Can Be (1996).

84/ See First R&O, supra, 15 FCC Rcd at 2346-49 ¶¶42-47 (discussing the importance of employment as a means of fostering minority and female ownership, and noting that Section 309(j) of the Communications Act expressly requires

the Commission to promote minority ownership in the manner in which it issues licenses.)

85/ MMTC Local Radio Ownership Comments, supra, pp. 105-106.

86/ Id. at 107.

3. EEO rules improve the industry's reputation among consumers and the labor force. Hopefully, the majority of broadcasters and cable companies do not discriminate, and many broadcast and cable companies take steps to prevent discrimination. However, the industries' reputations, and their ability to attract and retain quality talent, depend on the maintenance of a virtually discrimination-free environment. Any industry's reputation among consumers and among members of its own labor force can suffer dearly from even a few incidents of lawless or antisocial conduct.[87/] Strong civil rights enforcement delivers a public benefit that industry self-regulation can never deliver: a good reputation for the industry as a place that welcomes and rewards people with productive careers irrespective of race or gender, and that delivers content that consumers can trust.

D. Nondiscriminatory broadcast and cable employment promotes both intra-station and inter-station diversity of voices

The Commission regulated wisely between 1969 and 1998 when it promoted diversity through equal employment opportunity. Diversity is not the primary focus of the proposed rules. But even if it is deemed secondary to other goals, the Commission should take note of the importance of diversity as one of the reasons why we need these rules.

87/ This phenomenon is well known in economic development circles. Most people don't steal, but a police force is still

needed to protect victims and protect the town from acquiring a reputation for being unsafe. The cost of an additional police officer may far exceed the theft losses she will prevent, but the additional officer may well preserve for the town a far greater ability to compete in attracting new industry and new residents.

Although owners exercise ultimately program control, employees also exercise considerable influence over what goes out over the air. Particularly in this age of consolidation and absentee corporate control, owners cannot possibly monitor each program at each local station or cable system. They delegate those decisions to on-site managers, who delegate them in turn to line professionals subject to in-house operating guidelines. When a broadcast station or cable system chooses which PSAs to produce, and which guests and topics to include in a public affairs program, the station or cable system is creating the raw material of program diversity. As the expert agency, the Commission knows that line employees play a significant role in making these programming decisions.

It is well established in the record of this docket that an integrated broadcast and cable staff leads to diverse programming.[88/] This has been obvious to the Commission at least since UCC I, which involved a segregated television station in Jackson, Mississippi whose idea of programming in the public interest was to refuse even to allow African American clergy to

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88/ See 1999 EEO Supporters Comments, supra, at pp. 134-166; First R&O, supra, 15 FCC Rcd at 2349-58 ¶¶48-62. As Justice Brennan put it in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 582 (1990) ("Metro Broadcasting"):

> [w]hile we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves (emphasis added).

offer the invocations at sign-off. The nexus between staffing and program diversity is borne out by extensive empirical research.[89/] Critics of the social construct of race often cast scorn on the diversity rationale, theorizing either that minorities have no viewpoints, culture, needs and interests distinct from those of society as a whole, or that if they do, the law cannot recognize that they exist.[90/] Taking that as true for a brief moment, our colleagues with this worldview should be embracing the EEO rules -- and here is why.

As underscored in the Pollak Letter, the end of discrimination in broadcasting would have a pronounced ripple effect in reducing discrimination throughout society, given the influence of broadcasting on national values.[91/] Research overwhelmingly shows how deeply the media helps determine what Americans know about one another. In 2001, a comprehensive survey of all racial groups (the "Kaiser Study")[92/] asked this question:

89/ These studies are collected in the 1999 EEO Supporters Comments, supra, at pp. 166-171 (incorporated by reference). Numerous research studies on minority ownership and program diversity are cited in Metro Broadcasting, supra, 497 U.S. at 583, fns. 31-34. A 2000 report commissioned by the FCC, collects the fruits of subsequent research. See Allen Hammond et al., "Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?" (2000).

90/ Cf. Lutheran Church, supra, 141 F.3d at 355; id. at n. 14 ("[r]ace, by itself, seems a rather unreliable proxy for taste.")

91/ See Pollak Letter, supra, reprinted in 1968 EEO MO&O and NPRM, supra, 13 FCC2d at 775-77.

92/ Washington Post/Kaiser Family Foundation/Harvard University,
"Race and Ethnicity in 2001: Attitudes, Perceptions, and Experiences" (August, 2001) (providing extensive data on the views and experiences of a representative national sample of 1,709 persons of all races).

> We're interested in where people get their information about different racial and ethnic groups. Would you say your opinions about [name of group] are based mainly on...
>
> - direct personal contact
> - things you've heard from family or friends
> - things you've seen or heard in the media
> - just a general sense you have
> - don't know.
>
> The answers were startling:
>
> - 17% of non-African Americans answered "the media" as their main source about African Americans;
> - 21% of non-Hispanics answered "the media" as their main source about Hispanics; and
> - 23% of non-Asians answered "the media" as their main source about Asians. 93/

Thus, even assuming it is true that the needs, interests, tastes and viewpoints of each racial group are identical to one another, millions of Americans would not know that unless minorities are able to appear and be heard in the media. And for that to happen, minorities have to have a fair chance -- at least an equal opportunity -- to work in the media.

Diversity in the media, then, is necessary in order for the nation to know -- and judge for itself -- whether and to what extent minorities are similar to or different from others, and whether asserted racial stereotypes are true.[94/]

93/ Id. at 25.

94/ See Carol R. Goforth, "'What is She?' How Race Matters and Why it Shouldn't," 46 DePaul L. Rev. l, 63 (l996) (suggesting that negative media reports about African Americans, such as high rates of crime, drug use, unemployment, and teen pregnancy reinforce stereotypical beliefs.)

Diversity in the media does not depend on stereotypes; diversity is the way to break down stereotypes.

In Lutheran Church, the D.C. Circuit found diversity not to be sufficiently compelling if strict scrutiny were applied.[95/] Strict scrutiny is not the standard of review for a race-neutral program like the one proposed in this proceeding, but it is nonetheless noteworthy that Lutheran Church included dictum to the effect that the Commission might be more justified in promoting "inter-station" diversity -- that is, minority ownership might more likely be tied to programming diversity than minority employment.[96/]

This theory is not without validity. Owners make ultimate program decisions, and the Supreme Court has found (applying intermediate scrutiny) that minority ownership powerfully influences program diversity.[97/]

How, then, can the Commission promote "inter-station" diversity? The answer, as we have noted, is that employment is the most direct route to ownership.[98/] The Commission has found that

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95/ Lutheran Church, supra, 141 F.3d at 354 ("[w]e do not think diversity can be elevated to the 'compelling' level....")

96/ Id. at 355 ("[i]t is at least understandable why the Commission would seek station to station differences[.]")

97/ Justice Brennan's majority opinion in Metro Broadcasting, supra, 497 U.S. at 580-82, concluded:

> [e]vidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities...minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities.

98/ See p. 6 n. 32 and p. 28 supra. A through discussion of the relationship between minority ownership and EEO may be found in 1999 EEO Supporters Comments, supra, at 167-174.

"employment discrimination in the broadcast industry inhibits our efforts to diversify media ownership by impeding opportunities for minorities and women to learn the operating and management skills necessary to become media owners and entrepreneurs") (fn. omitted).[99/]

Thus, the EEO rules promote "intra-station diversity" and they also promote "inter-station diversity" in a powerful way. Indeed, with the loss of the minority ownership programs, the EEO rules have been the only way to promote inter-station diversity.[100/]

99/ EEO Streamlining (NPRM), supra, 11 FCC Rcd at 5167 ¶3. See also Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 2788, 2790 n. 22 (1995) ("it is often the case in the mass media industry that station or system owners were once employees of that facility or of another facility. Thus, increasing minority employment in the mass media may ultimately contribute to increased minority ownership"); Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules (Policy Statement), 9 FCC Rcd 929, 929-30 ¶3 (1994) ("increased employment opportunities are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership"); Amending Broadcast EEO and FCC Form 395, FCC 80-328 (June 25, 1980) at ¶13 (the "EEO requirements and policies favor....minority ownership so that programming will reflect the needs and interests of minority groups"); cf. Edens Broadcasting, Inc., 8 FCC Rcd 4905, 4908 (1993) (Statement of Commissioner Andrew C. Barrett, Concurring in Part and Dissenting in Part) (questioning "how our minority ownership policies can continue to have some impact, where minorities constantly are penalized for a lack of broadcast or cable management level experience. If the FCC does not continue efforts to aggressively enforce its EEO rules, minority employment and minority ownership in the media industry will continue to suffer" (fn. omitted)).

100/ See 1999 EEO Supporters Comments, supra, at pp. 171-174

(discussing importance and loss of the tax certificate and other policies formerly instrumental in promoting inter-station diversity.)

III. The Need For Enforceable EEO Rules Is Greater Than Ever

A. Notwithstanding the scarcity of FCC prosecutions of discriminators, most job applicants encounter discrimination

We have shown that if only ten percent of broadcasters discriminate, a job applicant will have a 50% chance of encountering discrimination if she files just seven job applications.[101/] How extensive is discrimination in broadcasting today?

In response to a Congressional mandate, the Commission developed an extensive record showing that continued EEO regulation was warranted based on industry behavior.[102/] On appeal, the

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101/ See pp. 20-21 supra, which also demonstrated that if 20% of broadcasters discriminate, a job applicant filing seven applications would have an 80% chance of encountering discrimination.

102/ In 1992, Congress required the Commission to conduct an inquiry on, inter alia, "the effect and operation of [the EEO portions of the 1992 Cable Act]" in which the Commission "shall consider the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting equality of employment opportunity and promotion opportunity, and particularly the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority." Section 22(g) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. N. 102-385, 106 Stat. 1460 (1992), quoted in Implementation of the Commission's Equal Employment Opportunity Rules (NOI), 9 FCC Rcd 2047 ¶2 (1994). After conducting the required proceeding, the Commission produced the 1994 EEO Report, supra, 9 FCC Rcd at 6276 et seq., which concluded that "there

continues to be evidence in cases in which the Commission sanctions licensees that women and minorities are still not recruited for a significant number of positions. In fact, despite our requirements, in many of these cases, for which we have issued sanctions, positions were filled without any recruitment having taken place. Given the foregoing, we believe that a continuing need exists for EEO enforcement in the communications industry." (fns. omitted). Id., 9 FCC Rcd at 6314-15 ¶79.

state associations contended that there was actually no evidence that broadcasters had ever discriminated.[103/] The court of appeals did not rule on this question. Yet already, commentators are making the mistake of inferring from the scarcity of Commission decisions punishing discriminators that discrimination itself is rare.[104/] Their reasoning draws conclusions about an input (discrimination) through observation of an output (FCC decisions) -- precisely what the Lutheran Church Court criticized when it struck the use of Form 395 data (outputs) as a tool for estimating inputs (broad recruitment).[105/]

103/ State Associations' Main Brief at 40 ("[t]he Commission has not found, and could not find, that the broadcast industry has somehow been guilty of unlawful discrimination." The state associations cited statistics purporting to show that "the employment of minorities and women in the broadcast industry has grown dramatically in recent years." Id. However, these statistics also show that the employment of minorities and women will have to "grow[] dramatically" for another four generations at their current slow rate in order to eliminate the consequences of discrimination. See 1999 EEO Supporters Comments, supra, pp. 45-54 and especially Table 4, p. 52 (demonstrating that at the rate at which minority and female employment "has grown...in recent years" it will take until the year 2090 for for the representation of minorities in broadcast management, and until 2110 for the representation of minorities in the top four job categories, to resemble the representation of minorities in the workforce.)

104/ See, e.g., Harry F. Cole, "FCC Rewrites EEO Rules, Once Again," Radio World, March 11, 2002, pp. 31-32. Cole's argument is that "the rules prohibiting unlawful discrimination have been on the books for decades, giving interested parties the opportunity to raise and prove allegations of discrimination. Individuals and groups have advanced various allegations against various licensees over

the years. But after investigating those allegations, the commission has found actual discrimination only in a miniscule handful of extreme and unusual cases. In other words, actual, demonstrable discrimination does not appear to have been a problem, at least as far as the FCC's records show" and therefore "there is at least some reason to question whether there is any significant, industry-wide, problem of racial or ethnic discrimination in broadcast employment" (emphasis added).

105/ Lutheran Church, supra, 141 F.3d at 352-53.

The statistical evidence of gross disparities in minority representation in broadcast and cable employment is overwhelming.[106/] The anecdotal evidence of discrimination in broadcasting and cable also is overwhelming.[107/] Two recent and

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106/ See 1999 EEO Supporters Comments, supra, pp. 45-54 (and Tables 1-4) (showing huge and persistent disparities, particularly in management positions for minorities and women, sales positions for minorities, and engineering positions for women.) These disparities persist and in some instances are becoming more pronounced. See pp. 47-49 infra.

In August, 1999, NAMIC released a landmark study on minority employment in cable. Alisse Waterston et al., "A Look Towards Advancement: Minority Employment in Cable," NAMIC Research and Policy Committee, August, 1999 ("1999 NAMIC Study"). It found:

> Minorities are severely underrepresented in the executive suites of the cable industry. Minority representation in the general, not ethnic-identified companies, is about 5% for positions in the uppermost management categories: from Senior Vice President to CEO...for the MSOs, minority representation is about 7% for positions in the uppermost management categories....As compared to their representation in the general population (30%), minorities are seriously underrepresented across all cable management positions.

Id. (Summary).

107/ The 1999 NAMIC Study reached the following conclusions, which we believe are equally applicable to broadcasting:

> Systematic and institutional discrimination remains. Many people of color believe discrimination is common in corporate America and that discrimination tends to occur in the form of routine practices that keep minorities outside of important business and professional networks. Of specific concern is inequality in opportunity for promotions, and the persistence of both minority/white and minority/white by gender earnings gaps....

Results of the NAMIC membership survey reveal that discrimination remains an important issue for the cable industry. Nearly two out of five (37%) of NAMIC members could site a social/business disadvantage or systemic exclusion faced by ethnic or racial minorities at their company, and a

(n. 107 continued on p. 38)

all too typical incidents underscore how brazen it can be.[108/]

Research has shown that about twenty to twenty-five percent of employers discriminate at the application stage, although they

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107/ (continued from p. 37)

> substantial one of out five (20+/-%) of the NAMIC membership consistently perceive forms of discrimination to occur at their companies. A solid group of minorities (21%) and women (22%) perceive their respective personal attributes (race/ethnicity; gender) have a negative impact on opportunities at their companies....
>
> Approximately one out of five minority respondents also perceive discrimination in company policies and practices with respect to industry conferences, training programs, social networks, and career opportunities.

Id. (Summary).

108/ Some indication of the low level of attention sometimes given to equal opportunity can be gained from a 1998 incident involving a large, top ten market FM radio station. For over five weeks, the morning team (with the approval of senior station officials) aired daily a promotional giveaway of miniature garden hoes painted black. African American employees were required to package and ship hundreds of these "Black Hoes" to advertisers and listeners. The promotion, once exposed, was roundly condemned by national leaders of the National Organization for Women and the NAACP. Ultimately the licensee terminated a middle manager believed to have been involved in the promotion. Three African American employees sued the licensee, later settling out of court.

The parent company is based in the city where the promotion ran on the company's flagship FM station. Yet except for the station's promotion director (who was uncomfortable with the promotion) not a single one of the hundreds of company executives who must have heard the promotion repeatedly on the radio did anything about it.

Even employment advertising sometimes is overtly discriminatory. An example is a recruiting ad which ran in one of the three leading radio management daily faxes for at

least three weeks late in 200l. Placed by a large group owner of radio stations, the ad's text reads as follows:

(n. l08 continued on p. 39)

hardly announce this to the world.[109/] Thus, unless broadcasters are the only saints in the business world, it is all but certain that hundreds (or more) broadcasters discriminate regularly.

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l08/ (continued from p. 38)

MORNING RADIO FOR GUYS

> [Company] is looking for morning talent. We have an immediate opportunity in a major market. If you think you have what it takes to work in a major market and are currently working in a male-based format (rock, talk, sports) please forward your information immediately to us. This is a great opportunity to work with a company that understands talent. Please send all information in confidence to:
>
> [address of Company's Executive Vice President]
>
> [Company] is an EOE Employer.

The references to "Guys" in the title of the ad and to "male-based" programming clearly signaled which gender the company preferred. Furthermore, inasmuch as the company expressly regards "rock, talk [and] sports" to be "male-based" formats, potential job applicants who know better (e.g. because they've heard of Tina Turner and Madonna, Oprah Winfrey and Diane Rehm, and Venus Williams and Serena Williams among scores of other rockers, talkers and athletes) would realize that it would be futile to seek work at this company. Finally, the ad expressly and without good reason excluded those working in minority media (e.g., urban, Spanish, jazz, gospel stations) since it sought applications only from those who are "currently working in a male-based format (rock, talk, sports)[.]") To eliminate any doubt as to why this ad is discriminatory, one need only substitute the word "White" for "guy" and "male."

l09/ "Affirmative Action Under Assault: NAACP Fights To Save Important Programs" (NAACP, l996) reporting that in a study conducted between l990 and l992, the Fair Employment Council of Greater Washington, D.C. used White and Black testers to uncover the fact that Black job-seekers fared worse than identically qualified and identically dressed White

counterparts 24% of the time. Similar studies during the same time period by human rights agencies in Boston and Chicago and by the NAACP in Miami Beach arrived at almost exactly the same results -- about 20-25% of employers were caught brazenly discriminating against minority job applicants.

(n. 109 continued on p. 40)

This statistical and anecdotal evidence is not explainable on the theory that broadcasting and cable are so esoteric that those without equal access to education, such as minorities, tend to be less qualified. No college degree is required for mid-level sales and middle management positions in broadcasting and cable. Minorities are no less interested in media employment than anyone else. Nor, obviously, do minorities aspire to work only in the lower level jobs in television and cable.

Why, then, is there such a low FCC "conviction" rate for discriminators?

One factor is statistical: estimates of the volume of lawbreaking, derived from conviction or even arrest records, are unreliable, often understating the amount of lawbreaking by several orders of magnitude.[110/] No one suggests, for example, that the

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109/ (continued from p. 39)

These findings are consistent with survey research documenting that high proportions of minorities continue to experience employment discrimination. In August, 2001, the Kaiser Study found that the following percentages of racial groups answered "Yes" to the question "[h]ave you ever not been hired or promoted for a job because of your race or ethnic background" --

White: 10%
African American: 35%
Hispanic: 19%
Asian: 18%
Multi-racial: 19%

Id. at 28.

110/ See, e.g., U.S. v. Morrison, 529 U.S. 598, 632 (2000) (Souter, dissenting) (providing statistics to the effect that while over 4,000,000 women are battered every year by a husband or partner, arrest rates are as low as one for every 100 domestic assaults.)

IRS catches even one percent of tax cheaters, or that the police catch even one-one hundredth of a percent of speeders, or that the DEA catches more than a tiny fraction of drug dealers (much less drug users). Felonies like rape, which occurs to perhaps twenty percent of women, would, if fully investigated and prosecuted, result in the incarceration of perhaps five to ten percent of the nation's male population.

In the case of broadcast discrimination, there are at least nine reasons for the disparity between the incidence of lawbreaking and FCC prosecutions of lawbreakers.

1. Discrimination is so ubiquitous that it is tolerated. Before 1969, discrimination in broadcasting was the rule, not the exception, and that did not change overnight. Perhaps it went from being practiced by nearly one hundred percent of broadcasters to being practiced by ten or twenty percent of broadcasters. Imagine, though, what would happen if the noncompliance rate for the speed limit went from nearly one hundred percent (Washington Beltway, early evening rush hour) to just ten percent. Speeding would still be so ubiquitous that the authorities could only catch and prosecute a handful of violators. There are not enough police in the nation to arrest all of the speeders and then show up in court to testify at their trials. This problem surely applies to many types of widespread offenses -- rape and sexual battery, telemarketing fraud, fraudulent offshore banking, tax

cheating, marijuana possession, sales of cigarettes and liquor to minors -- and discrimination in nonbroadcast businesses, for that matter.

No one could rationally suggest that the number of convictions for these offenses even remotely represents the frequency with which the offenses actually occur. If all of the guilty parties for all of these offenses were incarcerated, almost no one would be left on the outside to work as a prison guard.

2. Concealment of discrimination is easy. The discrimination victim will never know that her job application was thrown into the trash, or that it wasn't true that "the job was just filled" or that there was a "better candidate."

3. The FCC almost never investigates EEO misconduct. From 1934 to 1972, the Commission brought not one discrimination case, even though during most of this time almost all broadcasters discriminated. Mercifully, no one suggested then that the absence of FCC prosecutions meant there must be no discrimination. In 1972, the Commission hired one person -- Lionel Monagas -- to try to secure industrywide compliance. He was overwhelmed and he could initiate no cases. Since 1972, prosecution has been almost as rare as it was beforehand. Throughout the past thirty years, almost no broadcasters were questioned by the Commission about whether they discriminated. And over the past thirty years, Bilingual investigations have involved little more than a single letter requesting documents and answers to a few stock questions -- the weakest form of discovery known to the law. There are no field investigators in the EEO Branch, and there

never have been. There has never in thirty years been a single pre-HDO deposition in an EEO case.

4. The miscreants are often influential people. Because of the marriage of convenience between broadcasters and political candidates, every broadcaster can get through to her congressman. A serious effort to prosecute a broadcast license is always a headache for the Commission's government relations staff. This helps explain why, if ten percent of broadcasters discriminate, the Commission will never try to take away ten percent of the broadcast licenses in the country.

5. Complainants, whistleblowers and witnesses risk their careers. In a close-knit industry with only a few job sites in a community, a person known to have filed an EEO grievance is routinely blacklisted and vilified as a disloyal troublemaker.[111/] A complainant must also face personal attacks (attempts to blame the discrimination on her), much in the way that sexual assault victims are frequently blamed in court for what happened to them. Moreover, this risk to one's career persists for years. The EEOC has a seven year backlog, and the FCC's petition to deny backlog throughout the past 30 years usually has been two to four years.

6. There is no plaintiff's bar. No one ever has, nor can anyone make a profit prosecuting discrimination in broadcasting fulltime. Although there are dozens of broadcast defense lawyers,

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lll/ According to the Government Accountability Project, 90% of all whistleblowers suffer some sort of reprisal. Caroline E. Mayer and Amy Joyce, "Blowing the Whistle," Washington Post, February l0, 2002, p. Hl, H4. The Commission was advised early in its EEO regulatory journey that "many people will not complain even though they suspect or know they have been treated unfairly in respect either to initial employment or management practices, that many people will not even seek employment where they believe discriminatory practices to exist, and that individuals have great difficulty in demonstrating the existence of discrimination where it does exist." l969 EEO R&O, supra, l8 FCC2d at 242.

the unlikelihood of success has made it impossible to recruit even one new plaintiff's lawyer to specialize in this cubbyhole of civil rights practice.

7. The cost of prosecution is very high. A Section 309 hearing costs the Commission hundreds of thousands of dollars, factoring in staff and facilities costs. Even if only ten percent of broadcasters were discriminating every year, and they were all put into hearing, the cost of these hearings would be $100,000,000 (involving perhaps 500 companies, and placing the cost per hearing at $200,000). That is about thirty-six percent of the Commission's entire annual budget.[112/]

8. The standard of proof is extremely high. Only intentional discrimination will lead to a hearing, and it almost always has to be proven through the words of the discriminator. Only the very careless discriminator is likely to disclose to others, even close confidants, that she is doing something that puts the broadcast license at risk.

9. The penalties upon conviction are very high. Appropriately, there is only one remedy available if a licensee discriminates: take away the license.[113/] But understandably, anyone in hearing for discrimination will fight very hard to be exonerated, conceal inculpatory evidence, and most likely will make individual discrimination victims settlement offers their families cannot rationally refuse. Knowing this, the Commission is unlikely

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ll2/ See "FCC's Budget of $278,092,000 Proposed for Fiscal Year 2003," FCC Press Release, February 4, 2002.

ll3/ Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 62l, 628, 633-35 (D.C. Cir. l978) ("Bilingual II").

to exercise its prosecutorial discretion to go to hearing except in a case it is sure to win.

The Catoctin case[114/] illuminates why there are so few discrimination prosecutions at the Commission. In Catoctin, a petition to deny filed in 1981 led eight years later to a final order taking away the license of a five-employee, 500 watt AM station in Fredonia, New York. Catoctin was brought successfully only because each of nine essential "stars" lined up:

1. An African American applicant, Cheryl Johnson, got an interview at the station without anyone at the station being aware that she was African American. What typically happens when a discriminator knows a minority has applied is that no interview ever occurs, and the applicant never knows why.

2. The interview was with the station owner. What typically happens is that a subordinate handles such interviews, and any discriminatory behavior can then be blamed on that person.

3. The owner then called the Buffalo CETA (job training) office that had sent Johnson for an interview. He exclaimed to caseworker Cheryl Gawronski "don't you have any white girls to send me?" adding that Johnson "would make charcoal look white." Many discriminators think this daily,

but not in a hundred years will they be careless enough to say this -- to a civil servant at that.

4. The caseworker, Gawronski, was outraged and reported the incident to her boss, Wayne Moore, who was equally outraged. They _____

ll4/ Catoctin Broadcasting of New York, Inc. (MO&O), 4 FCC Rcd 2553 (l989) ("Catoctin"), recon. denied, 4 FCC Rcd 63l2 (l989) (denying license renewal). The discussion below is from this decision and from the undersigned counsel's knowledge of the circumstances of the case.

had the presence of mind and tenacity to inform the Commission and local civil rights groups of the incident.

5. The FCC designated for hearing. That would not have happened if the station had had fifteen or more employees, since the FCC would then have sent the allegations to the EEOC, almost certainly never to see them again.[115/] Only once in thirty years has a charge referred by the FCC to EEOC ever found its way back to the FCC for a decision on the licensee's qualifications. In that case (involving WSM Radio in Nashville, the final order of discrimination arrived to the FCC seventeen years and four successor licensees later.

5. The Media Access Project (MAP) was able to represent the petitioners to deny pro bono. Over the course of five years MAP carried on the case without fee until the challengers prevailed. (How many other law firms would do that?)

6. Gawronski, Moore and Johnson, each of whom had nothing to gain, made the time to testify (very effectively) at the hearing.

7. There was no defense, apart from the owner's lying about the incident. Most broadcasters would show (or claim) they had offered a job to a minority person years ago, or have some other mitigating evidence to offer.

115/ See Memorandum of Understanding Between the Federal

Communications Commission and the Equal Employment Opportunity Commission (R&O), 70 FCC2d 2320, 2327 (l978) ("FCC/EEOC Agreement"), which provides that the FCC must refer a charge it receives to the EEOC, whereupon either or both agencies can process it. Since l969, there have only been two instances when the FCC processed a charge rather than waiting for the EEOC to act. The FCC/EEOC Agreement is discussed further at pp. 75-78 infra.

8. All of this profoundly offended the famously stubborn Administrative Law Judge Wallace Miller, who threw the Communications Act at the licensee.

9. The owner had also violated various other rules (including misrepresentations and contest fraud), enabling the Commission to take the license on misrepresentation grounds and then hold that in addition, the station could have been disqualified as a discriminator. Never has the Commission had to make an up-or-down choice to pull a license just for discrimination, something it apparently is hesitant to do.

Each of these nine stars had to line up for the prosecution in Catoctin to succeed. If even one of these events had not happened, there would have been no successful prosecution.

Consequently, the scarcity of successful FCC prosecutions of discriminators says nothing about the frequency of discrimination. The statistical and anecdotal evidence yields a far more accurate picture.

Above all, the Commission's history, and its institutional limitations, prove that discrimination cannot be stopped through proscriptive rules alone. It is far better to prevent discrimination from happening in the first place.

B. Discrimination in broadcasting appears to have increased since 1997

EEO-1 aggregate data for very large broadcast employers (100 or more employees, and federal contractors with 50 or

more employees) was available from the EEOC only for the years 1999 and 2000. This data discloses a familiar pattern: minorities were

grossly underrepresented in management and sales positions, and women were grossly underrepresented as technicians.[116/]

Without access to annual Form 395-B data, it is difficult to do a time series analysis on minority employment that would disclose hiring trends for which systemic discrimination appears to be partly or largely responsible. Other research, however, shows that in recent years, minority participation in broadcasting has either stalled or declined:

- In 1999 the Beverly Hills-Hollywood Branch of the NAACP and the Coalition of African American Television Writers reported that out of 839 writers employed on primetime network series, only 69 were minorities.

- Hispanics and Asian Americans make up only two percent of all evening news correspondents for CBS, ABC and NBC, according to the 1999 annual study of the College of Mass Communication and Media Arts at Southern Illinois University. The 2001 Network Television Correspondent Visibility Study, prepared by Joe Foote, Director of the Walter Cronkite School of Journalism and Mass Communications at Arizona State University, found that during 2001 the percentage of women in the TV network correspondent corps decreased for the third consecutive year from 33% in 1998 to 29% in 2001. Between 2000 and 2001, the number of minorities in the correspondent corps rose by one percentage point to 16%, but it remained below the high of 20% reached in 1998.

- The International Women's Media Foundation reported in 1999 that 61% of women journalists believe they still face barriers to advancement that their White and male counterparts do not face, with 51% saying they suspect that discrimination in promotion has hampered their professional advancement.

116/ See EEOC, "1999 EEO-1 Aggregate Report, SIC 483: Radio and

Television Broadcasting" and "2000 EEO-1 Aggregate Report, SIC 483: Radio and Television Broadcasting" (both supplied as Exhibit 1 to these Comments.) For 2000, minorities were 22.5% of the reporting companies' employees in all positions (including clerical, laborer and service worker positions), but were only 15.4% of officials and managers and 15.7% of sales workers. Women were 41.5% of all employees, but only 17.6% of technicians. Similar findings, based on 1995 data, are reported in the 1999 EEO Supporters Comments, supra, pp. 45-54.

- According to the 2001 Annual Report to Congress of the Corporation for Public Broadcasting, minority employment in public TV stations declined 3.6% in 2000, at the same rate as total employment, while minority employment in public radio grew 5.7%, greater than the rate of overall employment. These statistics did not include the 59 minority controlled public broadcasting stations where at least 50% of fulltime employees and 50% of governing board are minorities.

- The Directors Guild of America's study, "2000-2001 Television Season - Top Forty Prime Time Series Directors" (January 30, 2002) found that of the top 40 prime time drama and comedy television series (826 total episodes in 2000-2001, African Americans directed 3%, Latinos 2% and Asian Americans 1%.

- According to the RTNDA/Ball State University Survey of Women & Minorities in Radio & Television News (2001) and previous surveys in this series, between 1994 and 2001 the percentage of minorities among radio journalists declined from 14.7% to 10.7%, and the percentage of minorities among radio news directors declined from 8.6% to 4.4%. The percentage of minority news directors in television declined from 10% in 1998 to 8% in 2001. The percentage of female news directors in television declined from 23% in 1998 to 20.2% in 2001. Most of the minority news directors were at Spanish language stations; thus, for example, the percentage of African American television news directors in 2001 was 0.6% (down from 3% in 2000); the percentage of African American radio news directors was 1.5% (down from 3% in 2000 and from a high of 5.4% in 1994). In 2001, 14% of television stations with news staffs had no minorities at all; in radio, 84.5% of news staffs (not a misprint) had no minorities at all. <u>What this means is that except in minority owned and Spanish language stations, there are virtually no minorities in radio news</u>.

These are not good signs. At a minimum, there is insufficient evidence that the broadcasting industry has banished discrimination and taken all steps necessary to prevent discrimination in the future. Until there is

virtually no chance that a job applicant will encounter discrimination in a job search,[117/] the Commission should not rest in attempting to prevent discrimination.

117/ See pp. 20-21 supra (demonstrating high likelihood that a job applicant in broadcasting will encounter discrimination.)

C. The population is growing more diverse

The population being served by America's broadcasters and cable companies is growing far more diverse, accentuating the need to integrate these businesses.

Fifty-six years ago, the Commission recognized that "the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time."[118/] That goal is becoming more difficult to achieve, because the spectrum is full with stations but the land is still filling with people. In 1990, the last year for which data is available, there were 13,983,502 persons who speak English "less than 'very well.'"[119/] The Census Bureau projects that the population in 2010 will be 13.3% African American, 5.1% Asian American and 14.6% Hispanic.[120/]

The broadcasting and cable industries are poorly prepared to respond to the nation's demographic trends. In many substantial communities, the management, sales and professional ranks of broadcast and cable employment are virtually homogeneous. The diversity disparity between the population and the industries threatens the industries' long-term ability to serve all of the

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118/ Public Service Responsibility of Broadcast Licensees (Federal Communications Commission, 1946) (the "Blue Book") at 15.

119/ U.S. Census Bureau, "Detailed Language Spoken at Home and Ability to Speak English for Persons 5 Years and Over - 50 Languages with Greatest Number of Speakers" (1990).

120/ U.S. Census Bureau, "Population Estimates Program, Population Division: Annual Projections of the Total Resident Population, 1999 to 2100" (1999).

public in a variety of languages,[121/] and to recognize and serve the interests of a diversity of cultures.

D. The number of broadcasting jobs is shrinking, reducing opportunities for minorities and women who just got in the door

Over the past five or six years, the level of broadcast employment has frozen or begun to decline.[122/] Larger radio station platforms save operating expenses through such means as voicetracking and by combining their stations' news, traffic, engineering, sales, traffic, and back office functions. These trends reflect rational business decisionmaking, but their result is that many highly skilled employees chase an ever-shrinking supply of the jobs that remain.

Consequently, those formerly excluded from broadcasting have fewer opportunities to build their careers. Minorities and women, who typically lack the job tenure of other employees, inevitably

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121/ The Commission has long appreciated the role of multilingual broadcasting in facilitating Americans' adjustment and survival. See, e.g., Spanish International Communications Corporation, 2 FCC Rcd 3336, 3339 ¶18 (1987) (subsequent history omitted) (taking licensee's Spanish language programming into consideration as a factor mitigating its violation of prohibition on foreign ownership); Tele-Broadcasters of California, Inc., 58 RR2d 223, 228 (Rev. Bd. 1985) (Opinion by Member Blumenthal) (looking favorably on comparative proposal to offer Spanish language service because "minority audiences [are] usually the least-served by the mass-audience media.")

l22/ According to the Commission's annual broadcast employment trend reports (covering the period l97l through l997), there were l53,058 fulltime broadcast employees in l995 but only l49,975 in l997. FCC, l997 EEO Trend Report (June 6, l998) at 756. See also John M. Higgins, "Media's pink slip blues," Broadcasting and Cable, January 28, 2002, pp. 30, 3l (according to U.S. Bureau of Labor Statistics data, radio employment declined 0.4% in l999, increased 0.4% in 2000 and decreased 0.4% in 200l). For a discussion of consolidation and job shrinkage, see l999 EEO Supporters Comments, supra, pp. l0-l2.

face the phenomenon of "last hired, first fired" and thus will be disproportionately impacted by the job shrinkage attendant to consolidation.

One segment of the industry that has been particularly valuable in providing entry level and career development opportunities for minorities is minority owned radio. A study commissioned in 2002 by MMTC found that the number of minority owned or controlled commercial stations is increasing, the total number is still very small, and the number of minority owned companies in the business is declining sharply.[123/] Few nonminority stations hire very many minorities, so minorities have had to depend very heavily on minority owned stations for job opportunities. Approximately 52% of the minorities employed

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123/ See Kofi Ofori, "Radio Local Market Consolidation & Minority Ownership" (2002) at 10-12 (appended to the MMTC Local Radio Ownership Comments, supra) ("Radio Local Market Consolidation") (reporting that between 1997 and 2001, the number of privately-held minority owned commercial radio stations increased from 367 to 390 between 1997 and 2001; the number of publicly held minority controlled commercial radio stations increased from zero to 156, and the number of minority radio station owners decreased from 169 to 149). The minority owned and minority controlled stations together comprise about 4.1% of all commercial radio stations and (by MMTC's estimation) about 1.3% of radio industry asset value. Discrimination in the advertising business continues to be a cause of the uncertain prospects for sustained and successful minority ownership, as a 1999 study commissioned by the FCC documented. See Kofi Ofori, "When Being No. 1 Is Not Enough: The Impact of Advertising Practices on Minority-Owned and Minority-Formatted Broadcast Stations" (1999).

in radio work for minority owned or controlled stations.[124/] Notwithstanding their profound importance, minority owned stations are neither so numerous nor so prosperous that they are always available as a safe harbor for minorities laid off through "last hired, first fired."

124/ MMTC reviewed Form 395-B data for stations that were minority owned in both 1996 and 2000 and whose Form 395-B filings in each of those years reflected the same holdings (e.g., an AM-FM in each year). There were 32 such stations or AM-FM combinations, taking in 38 stations with a total fulltime employment in 2000 of 890, including 651 minorities (73%). There were 390 privately held minority owned commercial stations in 2001, and 156 commercial stations held by public companies controlled by minorities. See Radio Local Market Consolidation, discussed at p. 52 n. 123 supra. There are also 59 minority controlled noncommercial stations. See p. 49 supra (as reported in the 2001 Annual Report to Congress of the Corporation for Public Broadcasting); however, all but about ten of these are volunteer operations that do not file Form 395-B. MMTC estimates that of the minority owned and controlled radio stations, about one-third have fewer than five employees; these stations would not file Form 395-B and they would account only for a negligible number of employees. If we extrapolate from our sample of minority owned stations to the entire population of minority owned and controlled stations (including those in larger platforms), and if we exclude the non-Form 395-B small stations, we may conclude that the minority owned segment of the radio industry would have accounted for approximately 8,574 employees in 2001. The radio industry as a whole included (at last count) 66,066 fulltime employees. FCC, EEO Trend Report (1997). Thus, the minority owned or controlled radio stations account for approximately 13.1% of the fulltime jobs in the radio industry -- a remarkable number since only about 4% of the nation's radio stations are minority owned. 18.1% (11,961) of the fulltime jobs in the radio industry were held by minorities, according to the 1997 FCC EEO Trend Report. As noted above, 73% of the fulltime jobs at our sample of minority owned radio stations are held by minorities; if that figure applies to the industry as a whole, it means that 6,259 of the 8,574 minority owned stations' employees were minorities, and 6,259 (52%) the 11,961 minorities in radio work for minority owned stations. To sum up the key statistics:

18% of the fulltime jobs in radio are held by minorities;

13% of the fulltime jobs in radio are at minority owned stations;

73% of minority owned stations' employees are minorities;

52% of minorities in radio work at minority owned stations.

IV. The Commission's New EEO Proposal Is Constitutionally Sound

Not only may the Commission require regulatees to recruit broadly, the Commission must do so in order to remedy the consequences of its own facilitation of past discrimination.[125/] The current proposal attempts in a modest way to satisfy part of this duty. Most significantly, the Second NPRM recognizes the value of broad outreach not only as a means of finding additional employees, but also as a way of bringing those formerly excluded from broadcasting and cable inside the tent in the long term. In the Commission's view, broad outreach aims to reach

> persons who may not yet be aware of the opportunities available in broadcasting or cable or have not yet acquired the experience to compete for current vacancies. Such persons in the past may not have been aware of available opportunities because of word-of-mouth recruitment practices. Thus, interested members of the community will not only have access to information concerning specific job vacancies but also will be encouraged to develop the knowledge and skills to pursue them. 126/

As shown below, the Commission's new proposal is constitutionally noncontroversial.

A. Broad outreach, as defined in the new regulations, does not infringe on the rights of any person

The proposed rules are outreach rules. They expressly bar preferential hiring,[127/] and thus do not apply race to "selection_____

125/ See 1999 EEO Supporters Comments, supra, pp. 97-133 (discussing the Commission's involvement in past discrimination and explaining why the Commission not only is

permitted but is legally obligated to repair the damage it caused in mismanaging and misallocating the public spectrum resource.)

l26/ Second NPRM, supra, l6 FCC Rcd at 22852 ¶28.

l27/ Second NPRM, supra, l6 FCC Rcd at 22847 ¶l5. See also First R&O, supra, l5 FCC Rcd at 2382 ¶l30 (expressly stating that the rules do not require preferential treatment.)

procedures" in a manner that could in some instances trigger strict scrutiny.[128/]

A race-conscious government program might be subject to strict scrutiny if it deprives an individual of some entitlement she reasonably could expect to receive.[129/] Under the proposed

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128/ The Uniform Guidelines, 29 C.F.R. §1607 et seq. (1978) (revised as of July 1, 1999) are an authoritative statement designed to meet the "Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures[.]" Id. at §1607.1(A). They have been adopted by the EEOC, Civil Service Commission, Department of Labor and Department of Justice. Id. Their purpose is to "incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures...." Id. at §1607.1(B). The Uniform Guidelines specify that "[t]he use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or other ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated [as required by other provisions in the guidelines]." Id. at §1607.3(A). Consequently, it is very useful to know that recruitment is not considered to be a "selection procedure":

> C. Selection Procedures. These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunity or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are

not considered by these guidelines to be selection procedures.

27 C.F.R. §1607.2(C) (Scope) (emphasis added).

129/ See Adarand III, supra, 515 U.S. at 270 (Souter, dissenting) ("[w]hen the extirpation of lingering discriminatory effects is thought to require a catchup mechanism, like the racially preferential inducement under the statutes considered here, the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct.")

regulations, no one's reasonable expectations can be invaded. The proposed regulations would not affect anyone's ability to present her qualifications, have them considered, and secure employment on the basis of merit. Simply providing broad notice of job openings does not upset anyone's settled expectations because no one has the right to be insulated from competition from other qualified persons.[130/] Every court that has examined this question agrees.[131/] Recruitment is not discriminatory simply because it is

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130/ A White male who would have been hired if competing only against other White males recruited by word-of-mouth, but who was not hired because an equally or better qualified minority or woman learned of the job as a result of targeted recruitment, has not been deprived of any right owed to him under the equal protection component of the Fifth Amendment. "Whites and men are harmed only by competition from qualified candidates, which is not an appropriate objection." Shuford v. Alabama State Bd. of Education, 897 F.Supp. 1535, 1553 (M.D. Ala. 1995) ("Shuford"); cf. U.S. v. Paradise, 480 U.S. 149, 183 (1987) (evaluating race-conscious remedial decree in egregious race discrimination case, court holds that "[q]ualified white candidates simply have to compete with qualified black candidates.")

131/ The Commission does not propose to order broadcasters to grant minorities any preference denied to White males. Instead, it proposes to have broadcasters engage in outreach efforts that are inclusive. One objective of these outreach efforts is to ensure that minorities are made aware of employment opportunities, but this is because the record before the Commission shows that minorities have been most likely to be excluded from opportunities by word-of-mouth recruiting. There is nothing invidious about ensuring that broad recruiting programs reach those segments of the community that have been historically discriminated against and excluded. See Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998) (holding that a HUD outreach plan aimed at reaching minority as well as majority applicants, and including mailing to minority organizations, did not create a suspect racial

classification because "[e]very antidiscrimination statute aimed at racial discrimination and every enforcement measure taken under such a statute, reflects a concern with race. Such race-conscious purposes do not make enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause.") See also Allen v. Alabama State Board of Education, 164 F.3d 1347, 1352 (11th Cir. 1999) (holding that strict scrutiny does not apply to

(n. 131 continued on p. 57)

specifically designed to avoid practices that discriminated against specific groups (such as minorities and women) in the past.[132/]

Nor would the proposed regulations diminish the level of notice of job openings previously received. Even exclusionary and potentially discriminatory word-of-mouth recruitment may continue if the broadcaster also attempts to reach those not within the

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131/ (continued from p. 56)

efforts to recruit minority teachers when no one is disadvantaged because of her race, and declaring that "[w]here the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race, broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable"); Duffy v. Wolle, 123 F.3d 1026, 1038 (8th Cir. 1997) (finding that inclusive recruiting "enables employers to generate the largest pool of qualified applicants and helps ensure that women and minorities are not discriminatorily excluded from employment" and concluding (at 1038-39) that "[a]n employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination....The only harm to white males is that they must compete against a larger pool of qualified applicants.") Along similar lines, see Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (holding that presentations at job fairs and career days designed specifically to apprise minorities of career opportunities are race-neutral), as well as Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994), Billish v. City of Chicago, 962 F.2d 1269, 1290 (7th Cir. 1992), vacated on other grounds, 989 F.2d 890 (7th Cir.) (en banc), cert. denied, 510 U.S. 908 (1993), and Coral Construction Co. v. King County, 941 F.2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992).

132/ For example, jury selection must avoid procedures likely to discourage minority participation, such as de facto discriminatory procedures like reliance on voter rolls in a

jurisdiction where there are impediments to minority voter participation. See 28 U.S.C. §1863(b)(2) (allowing venire to be selected from sources other than voter registration or voting lists "when necessary to ensure that a fair cross-section of jurors will be selected randomly without discrimination on the basis of race, color, religion, sex, national origin or economic status.") See discussion of jury selection cases in 1999 EEO Supporters Comments, supra, pp. 19-21.

usual word-of-mouth circle.[133/] Thus, nothing in the rules would require, authorize or even condone diverting resources from one type of recruitment to another one.[134/] Consequently, the new regulations expand rather than transfer opportunity.

To avoid confusion, the Commission should address the following dictum in MD/DC/DE Broadcasters:

> Recruiting expenditures are fixed in the short run; even if an employer increases its recruiting budget in response to the Commission's EEO rule, it must then follow the Commission's directive in determining how to allocate those funds. 135/

In response, the Commission should make two things crystal clear.

First, the Commission should confirm that it does expect an employer to "increase its recruiting budget"[136/] if that is

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133/ See Recon., supra, 15 FCC Rcd at 22551 ¶7 ("a broadcaster is not precluded from utilizing 'word of mouth' recruitment sources so long as it has also used public recruitment sources sufficient to widely disseminate information concerning the vacancy, as required by our rules.") The test in determining race neutrality is whether the program promotes inclusion or exclusion: "[i]ncluding more qualified candidates in the pool is, as seems obvious...both proper and desirable. Therefore, techniques of inclusion do not require the traditional Title VII and equal protection analysis that courts have used for techniques of exclusion." Shuford, supra, 897 F.Supp. at 1552.

134/ In the First R&O, the Commission expressly justified the rules with reference to court holdings regarding "recruitment measures that are designed to *expand* the applicant pool" (emphasis added), showing that the Commission was not endorsing any shifting of resources away from recruiting nonminorities. See First R&O, supra, 15 FCC Rcd at 2414 ¶217.

135/ MD/DC/DE Broadcasters, supra, 236 F.3d at 20-21 n. **.

136/ Such a cost increase might amount to only a few cents a year.

The Commission has spoken favorably of "e-mail and fax [that] make the notification of a large number of sources less burdensome." First R&O, supra, 15 FCC Rcd at 2370 ¶92; id. at 2371 ¶97 ("a broadcaster may maintain an electronic list of recruitment sources and notify all the sources simultaneously with a single e-mail when a vacancy occurs.") Actually, the record in this docket contains nothing to suggest that most broadcast stations even have such a thing as a "recruiting budget" -- much less a budget so refined that it covers the length of e-mail or fax lists.

necessary in order to reach the entire community.

Second, the Commission should confirm that its "directive in determining how to allocate those funds" is that a regulatee must not respond to the rules by doing less nonminority recruitment. Instead, it must expand rather than transfer opportunity.

Experience demonstrates that the new regulations will not be applied in a discriminatory manner. Between 1971 and 1997, when the Commission administered considerably more far-reaching EEO regulations than those proposed here, there was not a single reported case or instance known to us in which a nonminority or a man alleged that he did not hear of a job because minorities and women were recruited. Nor was there a single case in which a broadcaster or cable company alleged that the Commission's EEO outreach requirements impeded it from fully notifying nonminorities and males of job openings.[137/]

There were only two cases in which broadcasters misinterpreted the rules, thinking that they should hire preferentially. In both cases, the Commission used strong language to sanction the errant broadcasters.[138/] This track record disproves the whispers of civil rights opponents that the Commission cannot be relied upon to apply its EEO rules fairly.

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l37/ See MMTC, "FCC EEO Enforcement, l994-l997" (May l3, l998) at 28 (discussed in the l999 EEO Supporters Comments, supra, p. 84) (finding that in approximately 3,000,000 hiring decisions and 75,000 license renewals in the broadcasting industry in the 28 years between l97l and l997, there had not been one complaint of this or any other kind of "reverse discrimination.")

l38/ In Applications of Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia, 95 FCC2d l, 9 (l983), the licensee hired a White woman as a receptionist

(n. l38 continued on p. 60)

B. The proposed rules do not "pressure" regulatees to discriminate

The MD/DC/DE Broadcasters court struck Option B of the 2000 regulations by making the following finding:

> Option B places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future. 139/

> It is not necessary for the Commission to find that every broadcaster discriminated. Among other things, the new regulations do not place "pressure" on any broadcaster to recruit minorities, and thus they are not subject to strict scrutiny. Option B is absent from the new regulations,[140] and it is the law of the case

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138/ (continued from p. 59)

with the understanding that she would be replaced when a qualified Black applicant was found. The Commission held that "the licensee may have misconstrued the intent of our nondiscrimination rule....We wish to make clear that particular positions are not to be set aside for any reason that would suggest discrimination...we shall require that the licensee submit a revised EEO program which sets forth the steps it proposes to increase the flow of minority job applicants...we admonish the licensee to review its personnel policies and practices to assure nondiscrimination in all aspects of its operation." In Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc., 10 FCC Rcd 6589, 6593 (ALJ, 1995), the licensee had proposed to reserve the next three vacancies at the station solely for minorities. The Administrative Law Judge ruled that this was "discriminatory on its face and grossly inconsistent with the Commission's EEO Rules."

139/ MD/DC/DE Broadcasters, supra, 236 F.3d at 21.

140/ Second NPRM, supra, 16 FCC Rcd at 22852-31 ¶¶28-31 (essentially readopting Option A, but not Option B). Nothing in the proposed new regulations could be regarded as disadvantaging White job candidates by making them "less likely to receive notification of job openings solely because of their race..." MD/DC/DE Broadcasters, supra, 236 F.3d at 21 (criticizing Option B). To eliminate all doubt, the Commission might wish to clarify that a broadcaster or cable company may not use something like Option B as one of its wild-card choices in Prong 3.

that Option A would not "pressure" broadcasters.[141] Option A is race-neutral with no "targeting" requirement, but nonetheless is designed to be broad enough to reach the entire community, including qualified minorities and women. The only "racial" attribute of Option A is its goal of preventing race discrimination, including particularly the kind of discrimination that has typically occurred in broadcasting. That goal -- self evidently -- does not make Option A discriminatory.[142]

141/ MD/DC/DE Broadcasters, supra, 236 F.3d at 19 (holding that Option A did not "place special emphasis upon the presence of women and minorities in the target audience." Thus, broadcasters were not "meaningfully pressured under Option A to recruit women and minorities." See p. 12 n. 47 supra for a discussion of the law of the case doctrine.

142/ See discussion at 1999 EEO Supporters Comments, supra, pp. 73-86.

III. The Proposed Rules Are Not Excessive

The Second NPRM solicits suggestions on providing "relief" to "small broadcasters or cable entities or those in small markets" and in making reporting requirements less "burdensome."[143/] It is unfortunate that the Commission chose to reopen this question, which has already been decided based on a copious record. The 2000 regulations' implementing forms were reviewed by the Office of Management and Budget on an extensive paper record that included an objection by the National Association of Broadcasters. In April, 2000, OMB approved the forms, and no one appealed.[144/] In MD/DC/DE Broadcasters, the state associations also challenged the rules on "burdensomeness" grounds, but the Court rejected that part of the state associations' challenge.[145/] Consequently, in light of OMB's findings and the MD/DC/DE Broadcasters opinion, the "nonburdensomeness" of the regulations is the law of the case. Compliance with the proposed regulations would not be materially more complex or time-consuming than compliance with the 2000

143/ Second NPRM, supra, 16 FCC Rcd at 22850 ¶20 (recruitment methods) and ¶22854 ¶32 (reporting requirements)

144/ OMB is responsible for implementing the Paperwork Reduction Act of 1995, 44 U.S.C. §3501 et seq. (1995). One of the purposes of the Act is to "minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection

of information by or for the Federal Government." 44 U.S.C. §350l(l). Thus, OMB is the expert agency on whether a regulation is overly "burdensome." The statute also provides for OMB preclearance of forms such as those issued pursuant to EEO regulations. 44 U.S.C. §3507(a)(2). When data is to be collected pursuant to a proposed rule, OMB must entertain public comment. 44 U.S.C. §3507(b). That was the nature of OMB's proceedings referred to in the text above.

l45/ MD/DC/DE Broadcasters, supra, 236 F.3d at l8.

regulations.[146/] And needless to say, routine EEO enforcement -- visited only on a small fraction of those deserving it -- has "burdened" no one except insofar as it has been inadequate.[147/]

146/ If anything, the "burdens" are less now. Advances in technology are rapidly reducing the cost and time required for EEO compliance. Sending job notices to fifty sources whenever a job is open requires a few minutes of work by e-mail or fax. The marginal cost of adding additional sources is zero. Maintaining job applications and applicant files is equally simple: they can be scanned, catalogued by applicant and by job characteristics, and stored on hard disk in a fraction of the time it once took to copy and file them in a drawer. Once on hard disk, the data takes up up no physical space and is almost impervious to destruction or loss. The time required for retrieving and cataloguing this information is minimal.

147/ As the Commission found in 1994, "approximately 96% of the renewals reviewed are granted without reporting conditions and/or sanctions." 1994 EEO Report, supra, 9 FCC Rcd at 6294. This finding was confirmed in the MMTC study "FCC EEO Enforcement, 1994-1997," supra (discussed in the 1999 EEO Supporters Comments, supra, pp. 205-212). MMTC's study, which longitudinally evaluated the Commission's EEO enforcement efforts, reviewed all 251 EEO enforcement rulings from the Commission and the Mass Media Bureau from 1994-1997, excluding the hearing designation order in Lutheran Church. Of these decisions, 156 (62%) were issued following a Bilingual investigation. Ninety-five (38%) were issued based on a record which did not include a Bilingual investigation. The Commission resolved ninety-six cases (38%) with a ruling absolving the licensee. In 37 cases (15%), the Commission issued a caution or admonishment, but imposed no sanctions. In 32 cases (13%), the COmmission issued a conditional renewal, but not a forfeiture or short term renewal. In 65 cases (26%), the Commission issued a conditional renewal and a forfeiture, but not a short term renewal. In 21 cases (8%), the Commission issued a conditional renewal, a forfeiture and a short term renewal. Thousands of broadcast renewal applications were granted during this time period; thus, only a very small fraction of the applications were even reviewed, and only 118 were the subject of sanctions.

The most troublesome finding, of course, is that the Commission caught zero percent of the discriminators. See discussion at 20-21 and 35-47 supra.

The risk of loss of license is and has always been a scintilla.[148/]

Like any public good, a discrimination-free industry requires effort. Individual broadcasters see only the tangible paperwork; freedom from discrimination is intangible and hard for many people to visualize. Thus, resistance to filling out forms is understandable because it is difficult for many people to compare the value of a tangible form with an intangible freedom. Similarly, some newer broadcasters may not recall that over the past generation virtually every other regulatory "burden" has been lifted from the industry, leaving EEO and very little else as core obligations.[149/]

148/ Between 1980 and 1994, only five cases were been set for hearing with EEO issues; none has been since. Nobody ever lost a license for violation of the affirmative action component of the rules, and only three licensees were ever found unqualified even partly because of violations of the nondiscrimination component of the rules. During that time period, no broadcast station was known to have suffered any material financial costs as a consequence of the time and expense of maintaining and filling out EEO forms, with one exception: eight of the fourteen occasions in which EEO issues were designated for hearing during that twenty-eight year period involved misrepresentations on those "burdensome" forms, leading to the inference that the licensees were covering up intentional discrimination. A discussion of these cases is provided in the Reply Comments of EEO Supporters in MM Docket No. 98-204, filed April 15, 1999 ("1999 EEO Supporters Reply Comments"), pp. 28-29.

149/ The scope of radio deregulation is breathtaking. Broadcasters are no longer required, inter alia, to preserve unique formats (FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981)), to ascertain needs (Deregulation of Radio, 84 FCC2d 979, 993-99 (1981) (subsequent history omitted)), to program to meet those needs (id.), to restrict commercialization (id.

at 1008), to broadcast modest amounts of nonentertainment programming (id. at 977), to broadcast local programming (id. at 993-99), to observe the Fairness Doctrine (Fairness Report, 2 FCC Rcd 5272, 5295 (1987)) and even to program most of the airtime on stations they own (Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 2787 ¶63 (1992)).

Any "burden" is relative to value. Relative to the economic value of a broadcast license and the overwhelming social importance of broadcasting in a democratic society, filling out EEO forms imposes only trivial "burdens." Joining in our nation's struggle to achieve full equality is not a "burden" from which America's broadcasters need "relief": it is among the greatest honors that our system of government bestows on businesses. As former commissioner Benjamin Hooks observed:

> While nobody enjoys filing papers with the government, the [then] triennial requirement for the submission of a program - made much more simple by the Sample EEO Program here adopted - was not a notably heavy burden and symbolized an industry-wide effort as well as operating as an educational tool for the participants. 150/

Finally, although it is reasonable to inquire into whether regulations are excessive for regulatees, the far more important question to ask regarding civil rights enforcement is whether the rules are sufficient to serve the needs of the public. The record in this docket shows that absent EEO regulation, qualified minority and female job seekers would be severely impeded in developing careers in their chosen fields.[151/] As we pointed out in our 1999 Comments, the absence of meaningful EEO regulations is unfair to job applicants because it guarantees that they will not learn of openings for which they are qualified, that they will waste time applying for openings that actually are not available to

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150/ Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 FCC2d 226, 256 (1996) (Dissenting Statement of Commissioner Benjamin L. Hooks), reversed in UCC III, supra, 560 F.2d at 529 et seq.

151/ See 1999 EEO Supporters Comments, supra, Vol. I, pp. 87-133; see also Vols. III and IV (statements and annotations of the statements of 22 witnesses).

them because of discrimination, and that they will be unable to develop careers in which they can reach their full intellectual and creative potential.[152/] The absence of EEO regulations also disadvantages minority organizations, which have no information upon which to advise job seekers on where to go to seek nondiscriminatory broadcast employment.[153/] Finally, the absence of EEO regulations disadvantages the public, which is deprived of more diverse broadcast service.[154/] EEO rules which are weak and ineffectual would violate the Regulatory Flexibility Act, and Section 257 of the Communications Act, by imposing barriers to entry on small entities, including minority owned broadcasters as well as organizations working to place minorities in broadcast careers.[155/]

Accordingly, there is no reason to diminish EEO enforcement on "burdensomeness" grounds. The rules will inevitably be weaker than the 1971-1997 rules, which were aimed at "achieving equal

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152/ 1999 EEO Supporters Comments, supra, Vol. III, Exhibit 16 (Declaration of Eduardo Peña, February 25, 1999), pp. 2-3 and 4-5.

153/ Id., pp. 3-4.

154/ Id., pp. 5-6.

155/ See Regulatory Flexibility Act of 1980 ("RFA"), 5 U.S.C. §601 et seq. (providing at §605(b) that a regulatory flexibility analysis must be prepared for rulemaking proceedings unless the agency certifies that "the rule will

not have a significant economic impact on a substantial number of small entities"); 47 U.S.C. §257(a), directing the Commission to complete a rulemaking proceeding "for the purpose of identifying and eliminating...market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services...." 47 U.S.C. §257(a). See discussion of Section 257 at p. 6 and n. 29 supra.

employment opportunity at the earliest possible time."[156/] For these weaker rules to "achieve equal employment opportunity at the earliest possible time" they must be respected and observed. For the rules to be respected and observed, the Commission must enforce them with strength and verify compliance with care.

Finally, we ask the Commission to upgrade its vocabulary. In an industry built on the power of words, the choice of language is substance, not symbolism. Those who control the language of debate control the direction of the debate, as this proceeding demonstrates all too well. In particular, the time has come to stop labeling efforts to prevent discrimination a "burden" from which certain regulatees need "relief."[157/] These labels date from the mid-1960s when (like their cousins "forced busing" and "law and order") they were invoked as polite code for massive industry resistance to the 1964 Civil Rights Act and to the Commission's 1969 EEO proposals.[158/] Judging from recent activity in this

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156/ Nondiscrimination in Broadcasting, 18 FCC2d 240, 245 (1969) (emphasis added) ("Nondiscrimination - 1969").

157/ The Second NPRM speaks of "relief" and refers to "less burdensome alternatives." Id., 16 FCC Rcd at 22850 ¶20 and ¶22854 ¶32, respectively. These terms refer only to regulatees. The Second NPRM does not seek comment on how to provide discrimination victims with more "relief" or how to reduce "burdens" on them. That is not because the Commission is insensitive to discrimination victims; instead, it reflects the fact that, over the years, opponents of civil rights have

succeeded in insinuating code words like "burden" and "relief" into the language of FCC regulation of broadcasting.

158/ A common tactic of those wishing to manipulate public opinion is to deploy code words (e.g. "law and order" or "forced busing") to appeal to the emotions of those favoring discrimination. See Teun van Dijk, Communicating Racism: Ethnic Prejudice in Thought and Talk 372-82 (1987) (documenting how code

(b. 158 continued on p. 68)

docket, that is still how many broadcasters interpret and deploy the words "burden" and "relief."

As Commissioner Hooks famously pointed out, government unthinkingly too often adopts the semantics of civil rights nullification and interposition.[159/] In this way, government unconsciously acquiesces to those who wish to transform the terms of the debate -- those who would have the government presume civil rights enforcement invalid unless justified, when actually civil rights nonenforcement should be presumed invalid unless justified.

The Commission should remove the words "burden" and "relief" from the lexicon it employs in civil rights decisions. In doing so, the Commission should proclaim that the duty of joining in our nation's struggle to achieve full equality should be regarded as among the greatest honors bestowed on businesses.

158/ (continued from p. 67)

words like "flood" or "invade" were used in Europe as code words to convey anti-immigrant prejudice); id. at 378 (explaining that a key function of this coded language is to allow prejudiced individuals to "confirm or 'ratify' these models and schemata by expressing [them] as characteristic examples of a consensus and as result of - literally - 'commonsense' reasoning. At the same time, they will appeal to hearers by asking for similar confirmation of the shared nature of their own opinions and experiences.")

159/ Dissenting from a decision to exempt two-thirds of the broadcasting industry from EEO outreach requirements, Commissioner Hooks declared that "it is almost inequitable to place a filing requirement only on larger stations and treat

the filing requirement as if it were a penalty rather than a concomitant of a positive, affirmative national effort to alleviate the patent inequality of opportunity and experience ....all licensees are public trustees and all have an equal mandate to serve the same public interest" (emphasis added). Nondiscrimination - 1976, 60 FCC2d at 257 (Dissenting Statement of Commissioner Benjamin L. Hooks), reversed in UCC III, supra, 560 F.2d at 529 et seq.

IV. The Substantive Requirements Of The Proposed Rules Can Be Improved Or Clarified

A. The Commission should flesh out its nondiscrimination requirement

For thirty years, the language of Section 73.2080(a) and the corresponding certifications on Form 396 have been virtually unchanged. Based on our experience, a few improvements in the nondiscrimination portion of the rules are needed.

1. Top management should be responsible for and personally involved in EEO implementation

If something important is done at a broadcast station or cable company, senior management is responsible. The Commission has long expected licensees to devote personal attention to the public interest.[160/] Thus, the Commission should address how, and why, senior management must maintain hands-on accountability for EEO compliance. There are four reasons why the Commission should expressly require top management[161/] to assume EEO responsibility.

160/ See, e.g., Trustees of the University of Pennsylvania, 69 FCC2d 1394, 1416 (1978), recon. denied, 71 FCC2d 416 (1979) ("broadcast licensees are permitted to delegate authority for day-to-day supervision and control. In fact, many, if not most, Commission licensees do just that as a matter of practical necessity. But in delegating, the licensee does not shed responsibility for deficiencies in the operation of the station. The licensee must assure that as problems arise, there are persons with both the authority and the willingness to act promptly to investigate and take appropriate corrective measures.")

l6l/ Broadcasters have on occasion stretched the limits of what a "manager" is. See, e.g., New Mexico Broadcasting Co., Inc. (Decision), 87 FCC2d 2l3, 246 ¶83 (l98l) (janitor categorized as a manager). See Window Dressing on the Set (U.S. Civil Rights Commission, l977) at 88-l07 (describing extensive misclassifications of women and minorities as officials and managers on Form 395, and noting that minority and female "managers" often supervised no one and earned low salaries). By "senior management" we mean the General Manager, or a fulltime Personnel Director or fulltime EEO Director if the employment unit is large enough to have one.

First, the new rules are likely to be less sweeping than the 1971 rules. Thus, it is particularly critical that the new rules receive the maximum degree of industry respect and engagement.

Second, as a result of consolidation, many broadcast EEO reporting units are growing larger. More functions formerly performed by top management are delegated down the personnel chain. Busy top managers often relegate personnel matter to second-tier or back office functionaries. Thus, EEO compliance is at risk of being performed by persons who lack the authority to make decisions, or who do not possess the skills and mature judgment needed to ongoing self-assessment and program evaluation. EEO compliance may also come to be performed by persons whose real job is to keep the company out of trouble, rather than by top managers whose job is to ensure that the company is a responsible citizen.

Third, the proposed rules are designed as a series of atomized tasks, such as showing up at job fairs, e-mailing job announcements and the like. That is a substantial paradigm shift from the 1971 rules. Those earlier rules were built primarily on the concept of self-assessment, which requires judgment and a broad perspective enjoyed only by top management. There is certainly an advantage to the approach in the new rules: by letting broadcasters select a list of four things to do, they may rest secure in the knowledge that

they have complied with the rules. However, this approach carries the risk that the entire responsibility for EEO compliance will be delegated to persons of limited skill and little responsibility. That would undermine the Commission's l968 goal of

"mak[ing] the broadcaster focus on the problem."[162/] To be sure, some of the activities broadcasters might select are high-visibility activities that are unlikely to be assigned to low-ranking subordinates,[163/] but others are less likely to be performed by top management without an express requirement that they do so. In particular, several of the Prong 3 activities require the licensee to cultivate a working relationship with community groups and recruitment sources. Delegating these tasks to subordinates could diminish the value of these relationships by conveying the message that top management regards these relationships as too distasteful or unimportant to handle personally. While a top manager need not personally perform each of the day to day tasks attendant to EEO implementation, she personally should be on top of the station's EEO policy and progress, and she should be expected personally to render the key decisions needed to implement the EEO program.

162/ See 1970 EEO R&O, supra, 23 FCC2d at 433. The Second Circuit spoke favorably of this rationale in 1976: "[n]o matter how informal a station's procedures, the requirement that it periodically think about its EEO efforts seems wholly reasonable." UCC III, supra, 560 F.2d at 534.

163/ We initially feared that companies choosing to do job fairs might simply send a filing clerk to the job fair to spend five minutes shaking hands and pick up a stack of resumes, which would then be discarded. See 1999 EEO Supporters Comments, supra, pp. 230-33. MMTC conducted two dozen job fairs from 1998-2001 and the market managers of the sponsoring companies (Clear Channel and Infinity) always

showed up. They usually stayed through the entire time to talk to job applicants -- often remaining past midnight to help the MMTC (and sometimes RAB) staff fold up and put away the tables and chairs. These managers were observing a classic "best practice." See p. 118 infra. It would not be an imposition on the industry for the Commission to expect all companies to have top managers participate in job fairs personally.

Fourth, as a matter of enforcement practice, and to be consistent with the Commission's interpretation of the law of agency,[164/] it is especially important to ensure that those who implement EEO programs are implicitly authorized to speak and act for the company. Only in that way can the Commission avoid the scenario in which a regulatee, caught violating the rules, attempts to escape accountability by asserting that its unlawful acts and omissions were those of low level subordinates.

2. Regulatees should certify that they do not rely primarily on word-of-mouth recruitment

The key issue in EEO enforcement is the excessive use of word-of-mouth recruitment by persons in a homogeneous workforce. As the Commission has noted, this practice can be inherently discriminatory.[165/] Consequently, it should be addressed, front and center, in Section 73.2080(a) of the regulations. That section of the model EEO program calls for a series of box-checking certifications. An additional box can be added with this statement: "We do not recruit job applicants primarily by word-of- mouth."[166/] This certification requirement would ensure that even if other methods are occasionally used to notify the public of job

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164/ Licensees are ultimately responsible for choosing and supervising their subordinates. See, e.g., University of Southern California, 11 FCC Rcd 7239, 7242 (1996) (rejecting a claim that EEO record was mitigated by mismanagement or

misconduct of a former employee); Trustees of the University of Pennsylvania, 69 FCC2d at 1394.

165/ See, e.g., Walton, supra, 78 FCC2d at 875.

166/ Such a certification requirement would not substitute for the need to ensure that the means of recruitment used in addition to word-of-mouth are sufficient to reach the entire community and thereby prevent discrimination. These broad outreach procedures are discussed at pp. 79-119 infra.

vacancies, word-of-mouth recruitment will still be the dominant method.

Prong 1 and Prong 2 should diminish the possibility that word-of-mouth recruitment will dominate as the means of recruitment. This certification would act as a safety net to ensure that through no chain of events, including disuse of Prong 1 and Prong 2 and selection of the nonrecruiting options in Prong 3, will word-of-mouth turn out to be the primary means of recruitment.

3. Word-of-mouth recruitment should be performed on an equal opportunity basis

Almost all licensees inevitably will perform some word-of-mouth recruitment. Therefore, the Commission should ensure that when word-of-mouth recruitment happens, it happens in a manner that minimizes the potential for discrimination.

To accomplish this, licensees should affirm that (1) when employees are invited to refer friends or colleagues for a job, that invitation is provided to all employees in the station, and that (2) those invited to refer friends or colleagues are specifically directed to make these referrals on an equal opportunity basis, being sure not to exclude friends or colleagues on the basis of race or gender. In this way, a broadcaster that uses word-of-mouth recruitment would disabuse its staff of the commonly held, seldom articulated, and hopefully erroneous notion that the company prefers word-of-mouth referrals to be of a particular race or gender.

4. Regulatees should certify that they commence broad recruitment concurrently with the start of any word-of-mouth recruitment

In our experience, a common means of circumventing the recruitment regulations has been to time the dissemination of broad

recruitment notices to occur well after the job vacancy has already been posted through word-of-mouth recruitment -- or even after the job has been filled. In this way, a discriminator can show the Commission that it technically complied with the rules, even though persons reached by broad recruitment actually had no opportunity to seek or obtain employment.

Delaying broad recruitment in this way gives an unfair headstart, or a hidden ironclad preference or set-aside to word-of-mouth recruitees. Thus, it can be inherently discriminatory. Consequently, the Commission should proscribe this practice by adding a certification to Section 73.2080(a), in which the respondent would check a box that states:

> When we undertake broad external recruitment for a position and also undertake word-of-mouth external recruitment, our broad external recruitment will commence by the time word-of-mouth external applicants first are solicited. 167/

This requirement can be verified through a fairly simple system of reporting, which is described later in these Comments.[168]/

167/ This language would still permit a broadcaster to post a job internally before recruiting externally. Before soliciting outside applicants, it is often desirable to give incumbents a chance to seek promotions or transfers. If a broadcaster follows this procedure, its internal postings might state that the position will be restricted to in-house applicants only up to a certain date; thereafter, external applicants may be solicited and will be considered although in-house applicants may still be preferred. In this way, a

broadcaster could not frustrate broad recruitment by (1) using an internal posting as a signal to employees to commence word-of-mouth recruitment to their friends; then (2) commencing broad recruitment only when the job is about to be filled (or has already been filled) by a word-of-mouth recruitee.

168/ See p. 145 infra.

5. Regulatees should report and update discrimination complaints currently and completely, including complaints handled through arbitration

In 1999, we urged the Commission to proscribe compulsory arbitration agreements.[169] We contended that these agreements immorally coerce employees to check their civil rights at the door as a condition to having a broadcast career.[170] We noted that the EEOC regards these agreements as contrary to Title VII.[171] We noted further that by requiring its employees to be bound by compulsory arbitration, a company could completely frustrate the Commission's requirement that licensees report whether they have been charged with discrimination -- a reporting requirement that is a logical and necessary component of any meaningful EEO enforcement program.[172] Finally, we offered twelve proposals aimed at

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169/ 1999 EEO Supporters Comments, supra, at pp. 252-60.

170/ Id. at p. 252 ("[c]ompulsory binding arbitration agreements are brazen attempts by companies to immunize themselves from EEO liability by requiring their employees, both new and tenured, to execute company-drafted, company-friendly, binding agreements never to file an EEO charge or complaint with the EEOC or the FCC, to answer questions asked of them by the FCC or EEOC, or even be a witness for someone else before the FCC or EEOC....We consider these agreements to present the greatest threat to equal opportunity in broadcasting in a generation.")

171/ Id., pp. 252-53. See EEOC, "Enforcement Guidance on Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes" (April 10, 1997) at 1; see also EEOC, "Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment" (July 10, 1997).

l72/ l999 EEO Supporters Comments, supra, pp. 253-54. Self evidently, there is no public interest served by keeping the public and the Commission ignorant of whether specific persons have information relevant to whether a broadcast licensee discriminated in violation of federal law. It is difficult to conceive of any

(n. l72 continued on p. 76)

conforming the arbitration process with FCC EEO precedent.[173/]

In the First R&O, the Commission ruled that the lawfulness of compulsory arbitration agreements was beyond the scope of the proceeding.[174/] And to be sure, the ultimate issue of the lawfulness of these agreements under Title VII and the Commission's EEO rules will have to await a clear test in the Supreme Court.

Nonetheless, a major development involving compulsory arbitration has just occurred, and this development falls squarely within the scope of this proceeding. On January 15, 2002, in EEOC v. Waffle House, the Supreme Court held that compulsory arbitration agreements do not bind the EEOC, a nonparty to such agreements.[175/] Thus, even when a complainant is kept out of court by an arbitration agreement, the EEOC may sue in its own name. As a nonparty to arbitration agreements, the EEOC is "the master of its own case."[176/]

172/ (continued from p. 75)

information more likely to lead to the discovery of a pattern of invidious discrimination than the identities of the persons who put their careers on the line to file discrimination complaints. Such a requirement is hardly unfair, since every broadcaster is keenly aware of who has made these allegations.

173/ 1999 EEO Supporters Comments, supra, pp. 257-60.

174/ See First R&O, supra 15 FCC Rcd at 2362 ¶73 (holding that the scope of the proceeding was only broad enough to allow the Commission to "revise the EEO rules in light of the court's decision in Lutheran Church.") Compare the scope of the Second NPRM, supra, 16 FCC Rcd at 22849 ¶19 (as discussed at p.78 n. 179 infra).

l75/ EEOC v. Waffle House, Inc., l22 S.Ct. 754, ___ U.S. ____ (2002) ("Waffle House").

l76/ Id. at 763 ("[t]he statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake.")

Waffle House directly impacts the FCC/EEOC Agreement.[177/] Under that Agreement, the FCC and the EEOC are expected to notify one another of discrimination complaints each receives, whereupon either agency, or both, may act to protect the public interest.[178/] The FCC often rejects discrimination allegations and renews licenses based on its belief that there have been no such complaints. However, the FCC's ability to act on, or even know of EEO complaints is frustrated if a person who would have filed a complaint with the FCC or the EEOC is barred from doing so due to a compulsory arbitration agreement. By preventing the FCC from receiving accurate information about broadcast employees, these agreements have the effect of invalidating a primary underpinning of FCC EEO regulation.

The Second NPRM expressly addresses the handling of EEO complaints. Therefore, the FCC's approach to the FCC/EEOC Agreement and compulsory arbitration falls squarely within the

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177/ FCC/EEOC Agreement, supra, 70 FCC2d at 2320 et seq.

178/ Under the FCC/EEOC Agreement, either the EEOC or the FCC has authority to investigate a discrimination allegation that was initially presented to either of them. Id. at 2327. While the EEOC usually performs this investigation, the FCC/EEOC Agreement provides that "situations may arise in which the Commission may act before a court decision." Id. at 2328 ¶21; see also id. at 2327 (providing that the FCC may inquire into EEO complaints "even before the EEOC's conciliatory process ends", citing Report on Uniform Policy as to Violations by Applicants of Laws of the United States, 1 RR, Part 3, §91.495 (1951), 42 FCC2d 399 (1973)) and at 2328

n. 12 (FCC is not precluded from undertaking a "collateral... investigation of employment matters in appropriate cases."))

scope of this proceeding.[179/]

To come into harmony with Waffle House, the FCC needs to know of the existence of discrimination complaints that are subject to compulsory arbitration. Otherwise, the FCC cannot fulfill its duty to notify and coordinate with the EEOC under the FCC/EEOC Agreement. Nor can the FCC fulfill its duty under that Agreement to determine whether it should investigate allegations of discrimination. Consequently, the FCC should take two steps:

First, it should require that a discrimination allegation subject to compulsory arbitration must be reported to the FCC if it otherwise would have been eligible for filing with the FCC or EEOC, or with a state or local agency sharing EEO enforcement authority with the EEOC.[180/]

Second, the FCC should insist that no arbitration agreement will be lawful if it contains provisions that would impede the FCC's ability to learn of, investigate and prosecute violations of the EEO Rules. In particular, the FCC should insist that an arbitration clause in an employment contract not preclude an employee or former employee from being a witness or providing evidence to the FCC on any matter within its jurisdiction.

179/ See Second NPRM, supra, 16 FCC Rcd at 22849 ¶19, stating that the Commission proposes to "retain our policy of generally deferring action on individual complaints of employment discrimination against broadcasters and cable

entities pending final action by the Equal Employment Opportunity Commission ('EEOC') or other government agencies and/or courts established to enforce discrimination laws. However, we propose to retain the discretion to take action, notwithstanding the absence of a final decision by the EEOC or other agency/court, where the facts of a particular case so warrant" (fns. omitted). See also id. at 22849 ¶18 (proposing to "recodify the anti-discrimination provision.")

180/ These are known as "Section 706 agencies." See 42 U.S.C. §706. An example is the D.C. Commission on Human Rights.

B. Broad recruitment for all vacancies is essential

1. Sources traditionally identified as minority- or female-specific may be used to expand rather than transfer opportunity

The Commission does not require targeted recruitment using minority organizations or media.[181/] Nonetheless, many broadcasters used these recruitment sources even before there was an outreach rule. Even more broadcasters use these recruitment sources now, even though we again lack such a rule. Those using these sources include minority owners, Spanish language and urban format specialists, and those who simply wish to give all qualified persons a chance to learn about and apply for a job. Many broadcasters would use these sources even if the FCC did not exist.

Nonetheless, in MD/DC/DE Broadcasters, the Court appeared, unintentionally, to cast some doubt on whether broadcasters are even permitted to use minority specific recruitment sources:

> If an employer believed that it could reach the maximum number of good prospects with a display ad in the local newspaper, but they would likely be non-minorities, then it nonetheless would choose to run a smaller newspaper ad and use its remaining funds to run an ad in a publication targeted at minorities. This redirection of resources hurts those prospective non-minority applicants who would respond to the display ad but not to the smaller ad, and it does so only because of their race. 182/

181/ See First R&O, supra, 15 FCC Rcd at 2363 ¶77 (there is no "specific requirement that broadcasters in every situation use recruitment methods that specifically target" minorities and women); id. at 2368 ¶85 ("[w]e will not dictate

the number or type of sources that a broadcaster must include in its own recruitment list"); Recon., supra, l5 FCC Rcd at 22653 ¶50 ("we would not find recruitment ineffective simply based on the fact that a broadcaster's interviewees came from a daily newspaper that reached the entire community, nor would we draw any adverse inference from that fact"); Second NPRM, supra, l6 FCC Rcd at 22850 ¶23 ("[w]e do not propose to require the use of recruitment sources that are specifically targeted at minorities, women or any other group.")

l82/ MD/DC/DE Broadcasters, supra, 236 F.3d at 2l-2l n. **.

We have learned that some broadcasters have read this language as a suggestion that if they make a business decision to use minority media, they will be at risk for an accusation that they engaged in "reverse discrimination." We have also learned that some broadcasters have read this language as implying that it is somehow distasteful to use minority media, or that these media are presumed by the courts to be inferior to other media, or that minority media are to be contacted only as a last resort rather than on their own merits. The Court's language has caused considerable concern among minority publishers, who recognize that even before MD/DC/DE Broadcasters, the majority of broadcasters did not use minority media.[183/]

The Court may have misunderstood the rules, or it assumed a fact not in evidence. The fact not in evidence is that White

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183/ In 1999, MMTC commissioned a study entitled "Verification of Recruitment Sources Within the Radio Broadcast Industry: An Empirical Study of EEO Compliance" ("Verification of Recruitment Sources") (found in the 1999 EEO Supporters Comments, supra, Vol. II., Appx.) The study was prepared by Dr. Audrey J. Murrell, Associate Professor at the Katz School of Management, University of Pittsburgh. She reviewed the recruiting practices of 503 radio stations, in 20 markets, that filed license renewal applications in 1997. Recruitment sources identified in the applications were contacted to determine whether they had heard from the stations claiming to have used them. These results are reported at p. 142 n. 310 infra.

Using Dr. Murrell's database, MMTC reviewed 111 EEO programs filed in 1997 in the 20 markets covered by her study. MMTC

classified, by type, all of the sources these broadcasters claimed to have contacted for all vacancies, and assumed that every source was contacted. The results are set out in the 1999 EEO Supporters Comments, pp. 215-217, Tables 7-9. Of the 111 stations, only 42 contacted local minority media (compared to 92 who contacted general audience media).

people don't read minority media. They can, and they do.[184/] Notwithstanding innocent colloquial designations like "minority media" or "Black newspaper", the truth is that a newspaper of general circulation has no race.[185/] It is not a person; it is a chattel full of ideas. It no more has a "race" than Europe or South America, or a classical or bebop composition.

As the expert agency, the Commission should expressly render this finding of fact: the Court's hypothetical has never been reported to have happened, and would almost surely never happen in real life. Broadcasters seldom run display ads in general market newspapers; instead, they run want ads. Sometimes broadcasters use additional media such as shoppers, campus newspapers and minority

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184/ See, e.g., The Media Audit, Media Profile Report for New York, NY, Spring/Fall, 1997, Audience: Total Adults Age 18+ "Ethnicity Profile: New York, NY Amsterdam News (courtesy of Eleanor Tatum, The Amsterdam News), reporting that the newspaper's readership was 62.8% Black, 24.2% Hispanic, 7.5% White and 5.4% others. The Amsterdam News is the largest circulation African American newspaper in the United States.

185/ A thought experiment will show why this key fact upsets the Court's hypothetical: suppose the Commission had issued a rule requiring broadcasters to purchase advertising in minority newspapers and to pay for those ads from money the broadcasters would have spent airing advertising in other newspapers. Such a rule probably would not survive "arbitrary and capricious" review under 5 U.S.C. §706, but the rule would not be unconstitutional because it would not deprive any individual of notice of a job -- or even of a chance to learn about a job -- because of that individual's race. The reason is that a newspaper has no race. No one has to be a minority

to read any particular newspaper of general circulation. Thus, at most, this hypothetical rule might disadvantage people who may be classified as "persons who do not choose to read certain newspapers." That is not a racial classification. Our hypothetical rule would be no more discriminatory than providing a federal grant to an impoverished historically Black college that is open to all races, while not providing it to another institution that does not need federal money to operate.

media. In this way, broadcasters can make sure that they are not missing any sources of qualified candidates.[186/] This approach expands opportunity, rather than transferring it.

To avoid further confusion about what the law is, the Commission should rule as follows:

First, any changes in recruitment procedures undertaken as a result of the new regulations should be designed to expand rather than transfer opportunity.[187/]

Second, while broadcasters are in no sense required to use minority-specific sources, they are permitted to use these or any other non-segregated sources to whatever extent they wish as long as the totality of their recruitment is broad and inclusive. In particular, the Commission should neither create nor let stand the misimpression that broadcasters cannot or should not use minority sources, or that there is something wrong with contacting sources (minority-specific or not) that are likely to produce minority applicants. A newspaper whose readership is ninety percent minority should be every bit as attractive as a newspaper whose readership is ninety percent White. That has to be true unless we unconsciously are assuming that a group of newspaper readers who are 90% minority is inferior to a group of newspaper readers who are 90% White.

186/ Of course broadcasters might in some instances determine, in

good faith, that the daily paper already reaches the entire community of qualified job candidates, including minorities, for the kinds of jobs being advertised. That is true of some newspapers and some jobs.

187/ See discussion at pp. 54-61 supra.

For EEO compliance purposes, then, there should be nothing wrong if a broadcaster that ran display ads in nonminority newspapers also ran ads in minority newspapers -- or vice versa -- as long as in doing so, the broadcaster did not diminish the level of recruitment it had found necessary in order to reach candidates who rely on other newspapers.[188/] Indeed, if it results in broad recruitment, there would be nothing wrong with a business decision in good faith primarily to use minority media. For example, could a broadcaster who has never advertised in the daily newspaper make a business decision to place her first print advertisement in a minority newspaper of general circulation? The answer has to be yes. Minority newspapers' ad rates are often very competitive on a gross cost and a CPM basis;[189/] that explains why municipal governments traditionally use these publications to post legal notices required to be printed in a newspaper of general

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188/ Cf. South Suburban Housing Center v. Greater South Suburban Bd. of Realtors, 935 F.2d 868, 883-84 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992) ("South Suburban") (holding that a recruitment program aimed at notifying more minorities of housing vacancies was race-neutral, and thus not violative of Title VIII, in the absence of concrete evidence of steering away of people who would otherwise apply). South Suburban specifically approved of advertising job vacancies in media that predominates in a minority community, when the company also advertises in media having a wider or national circulation. Id. at 872-73.

189/ For example, a Washington, D.C. broadcaster wishing to hire a college-educated radio producer would probably find it far more cost-effective to advertise in The Hilltop than in the Washington Post or the Washington Times. The Hilltop is

written, published, and read assiduously by the 750 communications majors at Howard University. It is widely circulated among the Howard School of Communications' thousands of alumni in the Washington area. On a CPM basis, where the target audiences are persons qualified for this radio producer's job and persons who know someone who is qualified for the job, The Hilltop would be very hard to beat. An ad placed elsewhere would require the broadcaster to pay for thousands of exposures wasted on unqualified people.

circulation. Furthermore, these newspapers may be the most effective way to reach certain types of candidates of all races -- such as news reporters, producers or researchers. Persons of all races who choose to stay informed about events occurring beyond the confines of their own neighborhoods or social circles often include minority publications in their pile of reading material. These persons are often precisely the best candidates for positions in broadcast journalism. If all other things are considered equal, a job prospect who reads both the minority and general market paper is more likely to have the inquiring mind every journalist needs.

The assumption that the daily newspaper automatically reaches everyone, while "minority" media never do, is wrong on the facts, and it presumes the inferiority and nonuniversality of minority media. The Commission can set this right by clarifying that broadcasters may adopt almost any publication or recruitment source they wish as long (1) adopting this source expands rather than transfers opportunity and (2) the broadcaster's recruitment efforts, taken as a whole, reaches the entire community.

2. Regulatees should be expected to cultivate outreach sources besides those customarily notified

The Commission should insist that broadcasters use a modicum of creativity in deciding where to recruit.

Although broadcasters are engaged in the business of creativity, many broadcasters have been surprisingly noncreative in their approach to broad outreach. Broadcasters won the repeal of ascertainment because they convinced the Commission they knew their

communities;[190/] yet time and time again many broadcasters' behavior in the EEO area proves that they really do not know their communities. Far too often, renewal applications simply incanted the words "NAACP" and "NOW" as recruitment sources, yet the broadcasters often never contacted these organizations' local offices to determine whether they would be be likely sources of job candidates or to encourage them to refer qualified people. Furthermore, most broadcasters habitually ignored even very obvious sources of job candidates, such as the broadcasting programs operated by leading local universities -- sources that should have been logical recruitment sources for any broadcaster irrespective of race.[191/]

Today, a common complaint of broadcasters is that their town is so small, homogeneous or sedentary that are few organizations that could provide them with job candidates. Yet this complaint often reflects nothing more than the fact that the broadcaster has not followed recent demographic trends (e.g., where there has been recent Hispanic or Asian in-migration) or that the broadcaster has

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190/ Deregulation of Radio, supra, 84 FCC2d at 998 (subsequent history omitted) (trusting broadcasters to "maintain contact with their community on a personal basis as when contacted by those seeking to bring community problems to the station's attention.")

l9l/ In l999, MMTC contacted officials at the four minority broadcast schools in the Washington area. MMTC found that most of the area's stations sent job notices to Howard University (l75 media graduates annually), but Bowie State (50 media graduates annually) regularly received notices from only two stations, the University of the District of Columbia (25 media graduates annually) regularly received notices from only nine stations, and the African American Media Incubator (20 media graduates annually) regularly received notices from only seven stations. l999 EEO Supporters Comments, supra, at p. 226. Perhaps some of the Maryland and D.C. broadcasters had other priorities besides broad recruitment.

not made the effort to learn about or cultivate relationships with professional, religious and civic leaders not within her own social circles. Sometimes, it is a local church, school, civic group or professional group, rather than the local outpost of a national organization, that is the most likely source of applicants not reached through traditional word-of-mouth recruitment.

Thus, it would be appropriate for the Commission to remind broadcasters to tailor their recruitment activities to the communities they serve. In particular, and without reference or regard to race, the Commission should encourage broadcasters to cultivate a variety of potential recruitment sources, including some never approached by broadcasters in the past. Examples include churches and other faith-based (or secular humanist) organizations, professional organizations (such as the local chapter of NAMIC, the National Association of Minorities in Communications), organizations serving the needs of recent immigrants (such as Miami's Haitian Refugee Center), schools, low power FM broadcasters, and neighborhood newsletters. The point is not to "target[] minorities, women or any other group;"[192/] the point is to be creative enough to reach all qualified persons.

192/ Second NPRM, supra, 16 FCC Rcd at 22850 ¶23.

3. The Commission can authorize a very narrow and exceedingly rare "emergency exception" to the rule that broadcasters should recruit for each vacancy [193]

The general rule that broadcasters must recruit for each vacancy dates from 1976,[194] and it has served the industry and the public well. It is incorporated in the regulations at 47 C.F.R. §73.2080(c)(1)(i).[195] The rule is well understood and easy to follow. It prevents considerable abuse and ensures consistency. Moreover, it has not been an excessive responsibility for the industry. The Commission proposes to retain this policy.[196]

In the First R&O, the Commission held that recruitment may not always be "feasible" for broadcasters.[197] The Second NPRM also contains this holding. As an example of "exceptional" circumstances that would justify an exception to broad recruitment, the Second NPRM mentioned a scenario in which there is a "need to replace immediately an employee who departs without notice and

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193/ MMTC appreciates the many wise suggestions of S. Jenell Trigg,
Esq. of Leventhal Senter & Lerman PLLC on the subject of exceptions to broad recruitment.

194/ See Sande Broadcasting Co., 58 FCC2d 139 (1976).

195/ Section 73.2080(c)(1)(i) (suspended) tates that "[a] station employment unit shall use recruitment sources for each vacancy sufficient in its reasonable, good faith judgment to widely disseminate information concerning the vacancy."

l96/ Second NPRM, supra, l6 FCC Rcd at 22850 ¶2l ("we do not intend to modify the rules in a way that would compromise our goal of enduring broad and inclusive outreach in the community for virtually all full-time job vacancies" (emphasis added)).

l97/ First R&O supra, l5 FCC Rcd at 2369 ¶89; Recon. Order, supra, l5 FCC2d at 22565-66 ¶¶6l-63.

whose duties cannot be fulfilled, even briefly, by other station or cable employees."[198/]

With some caveats, we support the Commission's continued recognition that there are very rare instances in which recruitment is impossible. We also recognize that broadcasters and the public would benefit from clarity and certainty regarding the circumstances for which failure to recruit can be excused.

There are four potential scenarios in which broad recruitment is at risk to be diminished. Here is how we recommend that the Commission regulate with respect to each scenario.

Scenario (1): The position can be filled without constraints of time or confidentiality. This scenario includes almost all job vacancies. The Commission should require full broad recruitment.

Scenario (2): Filling the position requires confidentiality. This scenario is rare. The Commission should require broadcasters to contact the broadest list of sources capable of honoring a confidentiality requirement.

Scenario (3): The position must be filled very quickly. This scenario is also rare. The Commission should require broadcasters to contact the broadest list of sources capable of responding quickly.

l98/ Second NPRM, supra, l6 FCC Rcd at 2285l ¶25. The Commission added, however, that these circumstances would be "rare" and that "licensees or cable operators should elect to proceed without recruitment only in exceptional circumstances" (fn. omitted; emphasis added).

Scenario (4): The position is essential to continued station operations and there is literally no time to fill it. This scenario presents a genuine emergency. The Commission should acknowledge that in this scenario, there is no need for broad recruitment.

To cover the situation in Scenario (4) above, we propose that an "emergency exception" be recognized to cover only those exceedingly rare occasions involving either of these two sub-scenarios:

Sub-scenario (4)(a): A unique need or opportunity arises to hire a specific key person, and the broadcaster knows in absolute good faith that this person is either the only qualified potential candidate or is far and away the best qualified potential candidate.

Sub-scenario (4)(b): The station faces a grave and immediate emergency that threatens its ability to stay on the air, and only a specific key person can solve the problem.

On these occasions, broad recruitment would serve no purpose other than falsely holding out to job-seekers the prospect of a job for which they will not actually have an opportunity to compete.

Some broadcasters might like to see a wider exception -- in fact, an exception so wide that it would swallow the rule and insulate from broad recruitment the very positions that carry the most influence, advancement potential, and

opportunity to contribute to diversity and competition. In particular, some broadcasters would like to be able to declare that top management or new anchor positions (a "Key Person") need not be the subject of broad recruitment in two types of instances. One is Scenario (2)

above: when a Key Person leaves suddenly and supposedly "must" be replaced immediately. The other is Scenario (3): when the licensee wishes to replace a Key Person, but the incumbent in the job does not know that.

Either of these potential exceptions to the rule of broad recruitment would swallow the rule. If these exceptions were allowed, a licensee would have to recruit broadly for a new manager or anchor only in those atypical instances in which the licensee has negotiated the current manager or anchor's graceful departure at a date well in the future. In practice, if a licensee did not want to bother with broad recruitment, all it would have to do is (e.g.) memorialize, for the file, that in its subjective judgment there was not enough time to recruit broadly. Having done that, the licensee would be free to fill the position the old-fashioned way -- through the old-boy network.

Some degree of broad recruitment can be performed even under constraints of time or confidentiality -- or both time and confidentiality -- as shown below.

Time (Scenario (2)). Suppose a Key Person literally walks off the job in the middle of the day without warning. As awful as this can be, the station will hardly be at risk of going dark, because broadcasters anticipate these emergencies. Every Key Person has an understudy who can fill in briefly, e.g., during times when the Key Person is away or is ill.

However, the time period during which the station can operate without the Key Person may be extremely limited; for example, the Key Person and her understudy may have defected at the same time, or the station is so small that the understudy would have to work sequential double shifts to satisfy

the obligations of both her regular job and the Key Person's job. Even in these rare instances, there will be some time to fill the vacancy, but not very much -- perhaps a day or two. The way to handle this is not to scuttle broad recruitment entirely, but to use those sources which can react very quickly and still reach out (even imperfectly) to the entire community. For example, rather than using the customary Internet postings, the personnel director could spend a few minutes e-mailing the placement directors of a broad spectrum of organizations, explain that a position must be filled immediately, and ask if someone with the requisite qualifications is available right now. Since these e-mails can be sent in a few minutes, this requirement would hardly be difficult to fulfill. Another approach is to plan in advance for the possibility that a painful defection or a potentially disastrous multiple simultaneous defection could occur. Broadcasters often follow this approach by maintaining a resume bank of prequalified outside candidates ready to step into a key job on very short notice.[199/] This resume bank can be developed at the company's leisure through broad recruitment. Thus, there is no need for a blanket "time exigency" exemption from broad recruitment.

199/ In KTEH Foundation, 11 FCC Rcd 2997, 2997 ¶23 (1996), the Commission wisely held that "a general notification unrelated to particular job openings is not a substitute for

recruitment contacts with sources designed to elicit minority and female applicants as each vacancy occurs." On the other hand, a general notification can enable a station to build a resume bank to be used both in emergencies and when vacancies occur in the normal course. A resume bank developed in this way can serve as a useful and businesslike supplement to broad recruitment.

Confidentiality (Scenario (3)). There are circumstances in which a broadcaster plans a high-level personnel change, and absolutely must not tip off the incumbent in the position, or tip off competitors. In that entirely legitimate scenario, it would be imprudent to recruit through sources that lack internal controls on information flow. On the other hand, the broadcaster can still disseminate the vacancy notice as widely as possible given the constraints of confidentiality. While media outlets and some community groups and educational institutions cannot assure confidentiality, reputable search firms always have that ability. A broadcaster that uses multiple search firms can engage one or two firms that specialize in reaching segments of the pool of qualified candidates that are seldom reached by other firms.[200/] Alternatively, a broadcaster that uses one search firm exclusively can instruct that firm to conduct its confidential search in a manner that includes all segments of the pool of qualified

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200/ Although minority owned executive search firms are not the only ones capable of serving this need, we take this opportunity to point out that there are dozens of these firms serving specialized industries. Each of the following serves mass media or telecom clients, including at least one Fortune 500 company: Aces Employment Consultants, Linden, NJ; Actren, Atlanta; Aspen Personnel Services, Inc., Takoma Park, MD; BG & Associates, Bethesda, MD; Carrington & Carrington Ltd., Chicago; Richard Clarke Associates Inc., New York; Corporate Plus, Atlanta; Excel Executive Recruiters, Fayetteville, GA; Executive Recruitment & Consulting, Inc., Cleveland; Executive Source International, Atlanta; Interspace Interactive Inc.,

New York; Robert L. Livingston Recruiting and Staffing, Lilburn, GA; Magnum Recruiting Group, Houston; Milo Research, New York; National Affirmative Action Center, Aurora, CO; New Horizons Executive Placement Service Inc.; OSA Partner Inc, Boston; Pathways International, Windsor, CT; Patience Motivation Belief Group, Atlanta; Professionals for Hire Inc., San Francisco; P.S.P. Agency, Brooklyn; Techtronix Technical Search, Milwaukee; W.G. Tucker & Associates, Pittsburgh; and Urban Recruiters Inc., Philadelphia.

candidates.[201/] Thus, there is no need for a blanket "confidentiality exigency" exemption from broad recruitment.

Here are four examples of circumstances that would justify an "emergency exception." The first two examples fit Sub-scenario (4)(a); the second two examples fit Sub-scenario (4)(b).

1. A specific talent becomes available due to either an expiration of her contract or failure to reach contract renewal terms. The station objectively determines that this specific person is vital to the station's ability to compete in its market. This person must be hired now, before she is lost to a competitor. In this example, broad recruitment would be a meaningless formality because this individual is not fungible.

2. The station is launching a new program, and a specific talent will be the main or highlighted feature. That person will be the only individual recruited for the job. In this example, too, broad recruitment would be a meaningless formality. News, entertainment and public affairs programs are often successfully launched only because a recognizable face or a "proven" personality is available to provide immediate audience acceptance and advertising support.

201/ An analogy may be found in a Washington law firm's search for a specialist in entertainment law. Public disclosure of the opening may act as a signal to competitors that a well-known broadcast client of the firm intends to merge with a

movie studio. Thus, it would be imprudent to recruit for this position through a lawyers' professional or trade organization or through the Internet. However, the law firm need not resign itself to relying just on the old-boy network. It can use specialized legal recruitment firms that ensure confidentiality and that have structured their operations to reach out broadly to all segments of the pool of qualified candidates.

3. The station's tower is located on a mountain and is subject to extremes of cold and wind. Only two people residing within sixty miles possess the engineering skills required to maintain a station on the air under these conditions, and one of them is the station's fulltime Chief Engineer. An electrical storm knocks out the exciter, causing the station to go dark. While the Chief Engineer is climbing the tower to make the repairs, she falls and will require months of hospitalization.

4. The station's CFO has been quietly embezzling hundreds of thousands of dollars from the payroll. The only other person familiar with the station's books is its outside accountant, who is preparing the corporate tax return. On March 14, 2003, the CFO takes her lunch break and never returns. The next day she calls in -- from Ibiza -- to resign. There is only one way to satisfy angry investors, and avoid Chapter 11: the station must hire the station's outside accountant as the new CFO.

In none of these examples would broad recruitment serve any purpose. Nonetheless, like any exception to a rule, an "emergency exception" carries some potential for abuse. To prevent abuse, the Commission should take three steps.

First, the Commission should explicitly state that the "emergency exception" is for truly exceptional purposes only

and therefore should be used only in those very rare situations that are comparable to the examples above.

Second, the Commission should remind broadcasters that "customer preference discrimination" violates the Commission's

nondiscrimination rule.[202/] In particular, a broadcaster's belief that some segments of the audience will disapprove of an on-air talent because of that person's race or gender can never enter into the broadcaster's choice of an employee,[203/] under the "unique talent exception" or at any other time.

202/ "Customer preference discrimination" is among the most venal forms of race and gender bias in the workplace. It occurs when an employer rationalizes preferential hiring by race or gender on the basis that his customers prefer to be served by members of that race or gender. The leading case is Diaz v. Pan American World Airways, 442 F.2d 385, 386 (5th Cir. 1971) (rejecting the airline's defense of its females-only hiring policy for "stewardesses" on the theory that male passengers prefer to be served by women.) For a case involving a broadcaster (which also appears to be the industry's only reported case of "reverse discrimination") see Chaline v. KCOH, Inc., 693 F.2d 477 (5th Cir. 1982) (upholding trial judge's finding that a Black-formatted radio station discriminated against a White announcer notwithstanding his "mastery of the voice and idiom" of Black radio.) The issue of customer preference discrimination sometimes arises at the Commission in cases where a broadcaster thinks (or says it thinks) its audience will not accept minority air personalities. See, e.g., Beaumont NAACP, supra, 854 F.2d at 509 (rejecting the Commission's ratification of a licensee's terminations of Black employees when the radio station's format changed from rhythm and blues to country and western.) Today, customer preference discrimination in broadcasting most often arises when stations hire news reporters, anchors, announcers and program hosts according to their race or gender. This brazen practice almost always works to the detriment of minorities and women, e.g., when a television station is uncomfortable having a Black man paired with a White woman as anchors, when a television station that would use a White man/White woman anchor team will not use a Black man/Black woman team, or when a country/western radio station will not consider minority or female candidates for announcing or sales positions.

203/ In our experience, customer preference discrimination often

enters into decisions to recruit on-air television news personnel. See 1999 EEO Supporters Comments, supra, pp. 20-23. It is an ill-kept secret that race and gender are commonly the initial screening attributes in these searches. The truth is slowly emerging. According to the deposition testimony of a major market TV station anchor, a Houston TV station was recruiting him because it was "looking for white males" so it could "pair them up with a female....In TV, you are cast in these big piles - blondes, or whatever. We are pieces of furniture." Paige Albiniak, "Gender gap on nightly beats," Broadcasting & Cable, February 9, 1999,

(n. 203 continued on p. 96)

Third, the Commission should expect a broadcaster using the "emergency exception" to maintain documentation of the need for this exception when it is invoked.[204/]

Broadcasters will derive a clearer and more comprehensive understanding of the "emergency exception" through the above examples than they would if the exception were reduced to cursory and general language into the rules. Therefore, the best way to incorporate the exception in the regulations is to place the following language after 47 C.F.R. §73.2080 (c)(l)(i):

> NOTE: The Commission recognizes a very rare "emergency exception" to 47 C.F.R. §73.2080(c)(l)(i). See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second Report and Order), l8 FCC Rcd _____ (2003).

203/ (continued from p. 95)

at 32. Race, too, remains a significant factor in determining employment opportunities in broadcast journalism: as one veteran Minneapolis TV reporter concluded, "broadcasting is the last industry in America that can legally discriminate." M. Allen, "Discrimination Suit Protests the Brief Shelf Life of a TV Anchorwoman," New York Times, January 24, l999, at 3l (quoting the testimony of Dennis House, WFSB-TV, Hartford, CT anchor and reporter). In January, l998, a jury awarded Hartford TV anchor Janet Peckinpaugh $8.3 million in her age and gender discrimination case. The company's defense was that pairing anchors of opposite sexes was an industry practice. D. Trigoboff, "Ex-anchor wins $8.3M bias suit," Broadcasting & Cable, February l, l998, at l3. Ironically, Peckinpaugh's employer, Post-Newsweek Stations, has long been among the industry's most sincere and progressive companies in equal employment compliance.

204/ This documentation might contain business secrets. Therefore, if there is a Bilingual investigation and the Commission requests this documentation, the broadcaster should

be permitted in some circumstances to redact trade secrets or make its submission in camera as allowed under the Freedom of Information Act, 5 U.S.C. §552(b)(6).

C. The lower limit on a regulatee's size that triggers certain compliance responsibilities should be retained

The Second NPRM inquires whether broadcasters with relatively few employees should be exempted from conducting broad recruitment.[205/] The answer has been no,[206/] and it should still be no. Exempting broadcasters with five to ten employees would eviscerate the program.[207/] Smaller broadcasters have fewer

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205/ Second NPRM, 16 FCC Rcd at 22857 ¶48 (seeking comment on "whether to increase the threshold to exempt broadcast and cable employment units of ten or fewer full-time employees from the outreach requirements.")

206/ UCC III, supra, 560 F.2d at 532. See also First R&O, supra, 15 FCC Rcd at 2380-82 ¶¶125-28.

207/ See MMTC, "EEO Programs and EEO Performance at Tennessee Radio Stations" (1996) ("Tennessee Study"), found as Exhibit 1 to MMTC et al. Comments in the 1996 EEO Streamlining proceeding, and discussed in the 1999 EEO Supporters Comments, supra, pp. 193-201. MMTC found that "[p]roposals to deregulate EEO compliance for small stations would have exempted 45% of the currently non-exempt Tennessee stations if the size cutoff were ten fulltime employees, 58% of the then non-exempt Tennessee stations if the size cutoff were fifteen fulltime employees and 70% of the then non-exempt Tennessee stations if the size cutoff were twenty fulltime employees." This 1996 finding involved pre-Telecom Act data; thus, the numbers may be different now in either direction -- either because there are relatively fewer standalone or AM-FM stations, or because there are relatively more stations with ten or fewer employees due to staffing cutbacks after consolidation.

The most recent data is from 1997. In the Second NPRM, the Commission reported that in that year, the number of full service broadcast stations with five to ten employees was 2,145, of which 200 were television stations. Id., 16 FCC Rcd at 22871 (Initial Regulatory Flexibility Analysis). At the

end of 1997, there were 12,227 full service radio stations and 1,564 television stations. See Broadcasting and Cable Yearbook 1998, p. xxxi. Thus, had the compliance floor been raised from five to eleven in 1997, we would have lost 17.5% of the radio stations and 12.8% of the television stations to EEO purgatory.

positions, of course, but they have higher turnover rates,[208/] and small broadcasters (as well as small market broadcasters) are the key points of entry for those historically excluded from the industry.[209/] Moreover, small broadcasters already have less to do

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208/ The Tennessee Study also found that the turnover rate for fulltime employees was negatively correlated with staff size -- meaning that smaller stations tend to turn over employees faster than larger stations. 1999 EEO Supporters Comments, supra, p. 200. The UCC III court made a similar observation, noting that in 1976, stations with fewer than ten employees, with 15.1% of the jobs, had 32% of the job opportunities and 41.7% of the entry-level job opportunities. The Court noted that "due to higher turnover and a greater willingness to hire inexperienced personnel, the small stations have more entry-level jobs...than their total employee strength indicates." Id., 560 F.2d at 535.

209/ Second NPRM, supra, 16 FCC Rcd at 22857 ¶48 (small stations "have an important role in providing entry level opportunities into the broadcast industry"); see also Equal Employment Opportunity in the Broadcast Radio and Television Services (R&O), 2 FCC Rcd 3967, 3970 ¶22 (1987), in which the Commission retained the five-employee size cap because it "recognize[d] that small broadcast stations often offer opportunities for entry by women and minorities to employment and careers in the broadcast field." In 1996, Commissioner Barrett opposed a "small station" exception, stating that

> [w]e cannot underestimate the importance of "small" stations for minority and female applicants' initial entry into the communications industry....I would argue that applicants, no matter their sex, race or ethnicity, often turn to smaller stations to acquire experience that they need to compete for employment at larger stations. Yet, all too often, I hear from those who have diligently sought employment at broadcast stations, only to be told that they lack the requisite experience. This highlights the "Catch 22" that many minorities and women face when seeking employment with broadcast stations.

EEO Streamlining (NPRM), supra, 11 FCC Rcd at 5171 (Separate Statement of Commissioner Andrew C. Barrett). As we have

documented, this observation is equally valid when applied to small market stations, since the broadcasting industry's personnel ladder is structured in a way that drives entry level personnel into small markets for their initial in-service training. See 1999 EEO Supporters Comments, supra, pp. 187-89.

in order to comply with the rules,[210/] and small broadcasters are almost never held to account for their compliance in any event.[211/]

Exempting smaller stations (or stations in small markets) would also impede the EEO efforts of larger stations. When minorities and women are denied a meaningful opportunity to enter this small-to-large market or small-to-large station pipeline, the larger stations will inevitably be forced to hire from smaller pools of experienced persons.

Finally, the very concept that broadcasters should be "exempt" from EEO compliance is morally unsound, implying as it does that EEO compliance is some kind of "burden" and not a privilege that makes a broadcaster and its industry better.[212/]

The Commission suggests that when the 2000 rules went into effect, some broadcasters may have chosen Option B to avoid the "burden" of performing these tasks.[213/] The implication is that

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210/ Second NPRM, supra, 16 FCC Rcd at 22852 ¶29 (broadcasters with fewer than eleven employees need perform only two Prong 3 menu options every two years).

211/ With extremely rare exceptions, since about 1980 the only occasions in which citizen groups filed EEO complaints against broadcasters with fewer than ten employees were when these broadcasters appeared to have openly and notoriously discriminated.

212/ See pp. 67-68 supra (calling on the Commission to stop speaking of equal employment opportunity responsibilities as "burdens" from which "relief" would be a good thing.) See also Nondiscrimination - 1976, 60 FCC2d at 257 (Dissenting

Statement of Commissioner Benjamin L. Hooks) ("it is almost inequitable to place a filing requirement only on larger stations and treat the filing requirement as if it were a penalty rather than a concomitant of a positive, affirmative national effort to alleviate the patent inequality of opportunity and experience ....all licensees are public trustees and all have an equal mandate to serve the same public interest.")

213/ Second NPRM, supra, 16 FCC Rcd at 22852 ¶29.

the elimination of Option B might leave those who had chosen Option B with more work to do to comply with the proposed new rules than they anticipated doing under the 2000 rules. It does not seem obvious, however, that performing two Prong 3 tasks every two years is materially more time consuming or expensive than compiling the statistical data that had been required by Option B. Indeed, we understand that most broadcasters of all sizes chose Option A. Thus, the unavailability of Option B is no reason to even further weaken the recruitment obligations of smaller broadcasters.

The only new development in the broadcasting industry that changes the equities on this question is that consolidators are shrinking their staff sizes -- forcing more job candidates (including new entrants) to rely on smaller stations as their only hope for a broadcast career.[214/] Thus, now more than ever, a small station exemption from EEO is unjustified. As the Commission recognized when it adopted the EEO rules -- and should restate now in case there is any doubt:

> the depth and detail of any station's equal opportunity program will be expected to vary not only with the racial makeup of the community and area, but also with the size of the station. We do not expect smaller stations to submit elaborate programs. On the contrary, we recognize that with such smallness, a simpler response is correspondingly to be expected. 215/

Finally, the Commission should draft its final rules to put an end to each of three ways by which stations or station

platforms claim to be smaller than they really are in order to circumvent EEO responsibilities.

214/ See pp. 51-53 supra.

215/ 1970 EEO R&O, supra, 23 FCC2d at 433.

First, the Commission should prohibit breaking platforms down into separate "small" reporting units. When employees are co-situated or are working cooperatively from nearby buildings, they should be deemed part of the same Form 395-B reporting unit.[216/]

Second, the Commission should prohibit broadcasters from arbitrarily characterizing certain persons as "headquarters" employees for Form 395-B reporting purposes only.[217/] The Commission should declare that a person who actually devotes more than half of her work week to the activities of a station must be counted on that station's Form 395-B.

Third, the Commission should affirm that a brief period of operation with fewer than eleven (or six) employees does not reduce or eliminate outreach obligations throughout the entire license term.[218/] For simplicity and ease of administration, the Commission should declare that a station's staff size for EEO

216/ The First NPRM addressed the problem of platform operators gaming the system by claiming either that all employees are "headquarters" employees or by disaggregating platform employees into smaller clusters for EEO purposes only. Id., 15 FCC Rcd at 23034 ¶89. For example, an eight-station combination with 20 employees could claim that it is really four two-station clusters, each of which has five employees, and thereby avoid EEO scrutiny entirely; or it could claim that 18 employees are EEO-exempt "headquarters" staff while only two are station staff. Somehow this problem was overlooked in the First R&O. See id., 15 FCC Rcd at 2451 (Instructions for Completion of FCC Form 395-B). The Second NPRM was silent on it as well.

217/ See n. 216 supra.

218/ The conventional wisdom among many broadcasters under the 1971-1998 rules was that if they operated below the EEO size cap at renewal time and later rose above that cap, they would be EEO-exempt throughout the license term; and if they operated above the EEO size cap at renewal time and later fell below it, they would also become exempt from EEO compliance responsibilities.

compliance purposes in a particular year is its size as reported on the station's most recent Form 395-B, or its size for more than any consecutive sixty-day period, whichever is greater.

D. The outreach options should be modified or clarified

The Prong 3 outreach options are well thought out. None of them is so trivial that everyone will use it, and none is so difficult that no one will use it. They are diverse enough to allow any four or more of them to fit comfortably within the business culture and abilities of every regulatee.

In the past, some of the most far-reaching of the Prong 3 options have seldom been used by broadcasters.[219/] Thus, to be sure that the Prong 3 menu does not inadvertently disincentivize broadcasters from choosing of the more expansive options, the Commission should closely monitor Prong 3 option selection trends. The Commission should also refine the Prong 3 options, as suggested below.

1. Each option should be open to the general public, rather than restricted to a regulatee's employees' relatives, friends, audience or trade group members

All of the outreach options adopted in the First R&O and proposed in Prong 3 in the Second NPRM are well intended.[220/]

219/ In the Tennessee Study, supra, MMTC analyzed 210 license renewal applications for 33 variables reflecting market, station and EEO data. Among the key conclusions were that only 27% of the stations reported offering training or

internships, and only 12% of the stations reported participation in a job fair. See 1999 EEO Supporters Comments, supra, p. 198. The value of job fairs is discussed in the 1999 EEO Supporters Comments, pp. 230-32.

220/ First R&O, supra, 15 FCC Rcd at 2372-74 ¶¶99-103 (listing twelve specific options in menu for Option A, plus a wild card 13th option); Second NPRM, supra, 16 FCC Rcd at 22852 ¶30 (listing the same options).

However, many of these options may be subject to abuse, or at least to frustration of purpose through poorly designed implementation. We have seen instances where broadcasters:

- participated in a workshop on broadcast employment that was closed to the public and for which the registration fee was so high ($695 in one instance) that new entrants were effectively excluded;
- operated internship programs limited in practice to the children or close relatives of management employees of the station, it being understood within the station that these internships are intended as a "perk" in lieu of higher pay, and are not open to the entire community; and
- awarded broadcasting scholarships through racially exclusive private "segregation academies."

As the Commission learned through its experience with comparative hearings for construction permits, there is almost no limit to the creativity and initiative of those bent on circumventing the rules to suit their own purposes.[221/] While abuse cannot be avoided completely, it can be minimized in this area by including language on Form 396 that provides that when a respondent states that it is relying on a particular activity for EEO compliance credit, the activity is without a prohibitive charge to participants, and the activity is either open to the general public or is open to the entire student body of a non-segregated school.

221/ See, e.g., Bechtel v. FCC, 957 F.2d 873, 880 (D.C. Cir. 1991) ("Bechtel I") (famously criticizing "strange and unusual" business arrangements, such as (in Bechtel I) where "best friends and co-owners of a station swear not to consult with each other; family members with valuable broadcast

knowledge and experience agree not to assist the tyro station manager in the family; [and] people with steady jobs and families in one city pledge to leave them and move permanently to another[.]")

2. Passive Internet postings should not be a primary recruitment mechanism until the industry substantially upgrades its job sites to provide universal job posting by broadcasters and interactivity with those in the job market

The Second NPRM inquires whether Internet recruiting should be afforded EEO regulatory credit.[222/] As discussed below, the Commission should conclude that:

1. Internet recruiting can be credited now as a Prong 3 option.

2. However, Internet recruiting is not suitable as the exclusive means of outreach.

3. When it features universal posting by broadcasters and interactivity with those in the job market, Internet recruiting could become the primary means of outreach.

With one modest but very important exception for small broadcasters,[223/] it would be reasonable to give credit for Internet recruiting as one of several means of outreach.

222/ Second NPRM, supra, 16 FCC Rcd at 22851 ¶26 ("[w]e solicit comments as to whether the availability of the internet has expanded to the extent that it could be relied upon, by itself, to disseminate vacancy information through some or all communities. We particularly welcome comments documenting the development of the station association web sites during [the past two years] and the internet job site maintained by the Broadcast Executive Directors Association ('BEDA').")

223/ Internet recruiting is Option #11 in the twelve-option Prong 3 menu. Option #6 is posting jobs on a public job bank. These are the only two "passive" activities on the menu. See Second NPRM, supra, 16 FCC Rcd at 22852-53 ¶30. This combination of choices (#6 and #11) should not be authorized for a respondent that only has to perform two Prong 3 activities. Unlike the other ten options in the Prong 3 menu,

these two passive activities are unresponsive to the Commission's objective of enabling "persons who...have not yet acquired the experience to compete for current vacancies" to "develop the knowledge and skills to pursue them." Second NPRM, supra, 16 FCC Rcd at 22852 ¶28. Since small broadcasters are the first point of entry for those new to the industry, it is essential that the Commission not open a loophole that exempts small broadcasters from interacting with the very persons who most need their expertise and accessibility.

Nonetheless, an impersonal medium like the Internet should never be used as the exclusive means of reaching job candidates. In a people business like broadcasting, passive Internet postings can supplement, but never substitute for the personal touch. The Commission should avoid embracing the exclusive reliance on any technological intermediary that isolates the broadcaster from contact with the people it serves.

Unfortunately, some broadcasters would like to do little more than post vacancies on an industry website, and then claim to be equal opportunity employers. However, in 1977, the D.C. Circuit minced no words in denouncing the impersonal tactic of dealing with referral sources by "waiting for them to come to it."[224/] The Court viewed this "passivity" as "not what was envisioned by the Commission" when it established the EEO regulations.[225/]

Just two years ago, the Commission found that the state associations' Internet-based recruitment scheme to be an unrealistic substitute for EEO regulation because "most state broadcast associations do not yet in fact have internet job banks, and those that do post only a limited number of vacancies from local broadcast stations."[226/] The Commission also found that "[m]ost significantly... access to computers is not universal and this digital divide affects minorities

and those living in rural areas to a greater extent than other segments of the population....

224/ Black Broadcasting Coalition, supra, 556 F.2d at 62-63.

225/ Id.

226/ First R&O, supra, 15 FCC Rcd at 2368-69 n. 174.

We think it is preferable to consider the internet as one of several recruiting mechanisms."[227/]

That holding was wise then and it is wise now. There are three principal reasons why, at a minimum, the time has not yet arrived to rely primarily on the Internet for recruitment:

First, trade associations' websites are of limited use to incumbent employees seeking career advancement.

Second, even without the digital divide, we still lack anything approaching universal Internet service.

Third, Internet recruitment on trade organization sites is ill-suited to fulfilling the Commission's goal of assisting new entrants to broadcasting to develop the skills needed to enter the industry.

We discuss each of these issues below.

1. Limited usefulness of trade organization sites to incumbent employees. We will assume that the trade associations have the best of intentions. Nonetheless, it would be a mistake at this time to rely on industry or even nonindustry websites as the primary means of broad recruitment.

In response to the First NPRM, the state associations stated that they were arranging for, inter alia,

> the state associations' sponsorship of their own Broadcast Careers Web Pages, as well as BEDA's [Broadcast Executive Directors Association] Broadcast Careers Web Site, which is expected to be in operation in March 1999. Using these Internet pages and site, which will be available 24 hours per day, 354 days per year,

broadcasters will encourage potential applicants of all races and genders for jobs in the broadcast industry to post their resumes, *free of charge*, so that member stations will have a ready source of job applicants of all

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227/ Id.

> races and genders. The state associations' Broadcast Careers Web Pages will contain not only resumes of potential applicants, but also notices of *job openings* at stations that will list full-time and part-time job openings, categorized by radio and television, in the following ways: (1) by type of position - management, on-air/writer/producer, sales/ marketing, engineering/technical and clerical/administrative; and (2) by city and station. 228/

Having made this commitment to the Commission, it should not have been difficult for the state associations -- experts in communications and technology -- to put up 50 full service websites in three years. We agree that it would be a good idea for every broadcaster to post virtually all of its openings on its state association's site. Several of the EEO Supporters operate job sites that link to the National Alliance of State Broadcast Associations ("NASBA", formerly BEDA) site; the NASBA site, in turn, links to most state associations' sites.

Respectfully though, the state associations' website efforts must be regarded as embarrassing in light of the industry's capabilities and resources.[229/] The best that can be said is that this is a fledgling initiative, still in its earliest stages, and apparently not yet enjoy the support of most broadcasters.

MMTC recently reviewed the websites of NASBA and of each state association that has a website.[230/] MMTC concluded:

228/ Joint Comments of 46 Named State Broadcasters Associations in MM Docket No. 98-204, (filed March l, l999), at l8.

229/ Broadcast industry annual revenues in l999 were $57.6 billion. See Broadcasting and Cable Yearbook 200l, p. xxx.

230/ MMTC, "Summary of Contents of State Broadcast Associations' Website Employment Pages" (2002) ("MMTC Website Study"), appended hereto as Exhibit 2.

There is still no centralized, one-stop place to go to obtain a broadcast job. NASBA's site had only 153 jobs posted, and that site did not allow job seekers to post resumes.

Only twenty-six of the states had full service job sites -- that is, sites that allowed those seeking employees to post vacancy notices and that allowed those seeking employment to post resumes.

Those living in six states (Delaware, Florida, Maryland, Nebraska, Rhode Island and Utah, as well as in Puerto Rico and D.C.) have no state site leading them to jobs -- either because there was no site, or the site had no jobs and did not link to the NASBA site.

Most critically, it appears that the number of jobs posted is but a tiny fraction of the actual number of jobs available. This conclusion flows from the following facts.

Since most of the jobs posted on the state associations' websites did not have opening and closing dates, it is impossible to know with precision what percentage of actual industry job openings are posted on the websites. Yet it is still abundantly clear that only a very small percentage of the actual job openings are being posted on state association websites. It cannot be true, for example, that there are no broadcast jobs available in the fourth largest state, Florida, whose 1997 broadcast workforce exceeded 10,000. Nor can it be true that there were no jobs available in Hawaii, Mississippi or Nebraska, which have a combined broadcast workforce of almost 4,000.

The percentage of broadcast jobs reflected by state website postings varied widely among states. As noted, four states had job sites with no jobs available; an additional 23 states had job sites reflecting no more than half of one percent of the broadcast workforce. Only one state association job site -- Wyoming's -- contained postings that reflected more than 2% of the broadcast workforce. The actual number of job openings available on a given day cannot possibly be as low as 0.5% or less of the broadcast workforce.

Fortuitously, one of the state associations -- South Carolina -- did not delete stale postings from its website Some of the jobs posted on its site date back as far as October, 1999 -- two and a half years. The number

of jobs posted on that site, including the stale postings, was thirty-three. The l997 broadcast workforce for South Carolina was 2,835. Let us conservatively assume that the turnover rate in South Carolina was only 20% per year (far less than the 33% MMTC observed in its l996 study of all Tennessee radio stations). Under that assumption, there would have been, in 2 l/2 years, about l,4l8 broadcast job openings in the state. That means that this

> website included not more than 2.3% of the actual job openings. It seems unlikely, then, that any of the websites included even as many as l0% of the actual job openings in its state....
>
> The state associations' initiative may be viewed having some promise, but it is still in the most fledging state of development (fn. omitted). 231/

Even assuming the best of intentions, a trade association website faces an institutional deficiency not of its own making. Trade associations are composed of companies that compete with each other in local markets. There is only so much information a broadcaster wants to share with its adversary across the street. A broadcaster who would gladly post job vacancies in confidence with the unemployment office, with the NAACP or NOW, or with an executive recruitment firm, might be uncomfortable posting the same vacancy on a site its in-market competitors are likely to visit routinely. A very public job posting can alert competitors to strategic developments, such as another news program or a new sales initiative. These postings might signal a weakness that a competitor would want to exploit, or a strength that a competitor would wants to avoid.[232/]

231/ Id. at pp. 6-7.

232/ To be sure, a broadcaster could get around this problem by using a blind box. However, blind box ads typically exclude those currently employed at other local stations who want to advance their careers through a lateral move. An in-state applicant is unlikely to use a blind box out of fear that she could be applying to replace himself in her own job. Blind box ads on trade sites attract highly mobile people in

other states, but reaching these people is not the kind of broad outreach in the local community the EEO rules seek to promote. Very few of the jobs posted on the state associations' websites are blind box ads.

Another, and a very significant reason for the low number of job postings on many of the state associations' sites is the disinterest of too many rank and file broadcasters in all things EEO -- and particularly their traditional failure to recruit broadly even when the cost of doing so is negligible or zero. For example, broadcasters have never been particularly responsive to the NAB's longstanding and good faith effort to help broadcasters recruit broadly.[233/] And while this may be a sensitive subject, the truth is that several of the state associations do not yet enjoy, throughout their entire communities, an unblemished reputation for inclusiveness.[234/] Broadcasters' disinterest in broad recruitment, even on their own state associations' sites, is demonstrated by the fact that on many of the websites,

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233/ Most broadcasters for years have not even bothered to post job openings with the NAB's Employment Clearinghouse -- a fine service which is free for all NAB members. MMTC examined 111 renewal applications filed in 1997, finding that only nine reported to the Commission that they used the Clearinghouse. See 1999 EEO Supporters Comments, supra, pp. 216-17. The NAB operates a well-intended effort to stimulate broad recruitment, and it can't give it away. Evidence in the record also shows that while most broadcasters stated in their license renewal applications that they contact a variety of job openings, in practice many or most broadcasters did not contact these openings at all. See p. 142 n. 310 infra (discussing Verification of Recruitment Sources).

234/ All broadcast professionals are exceptionally well informed. Thus, it should come as no surprise that most minority broadcast professionals are aware that some of the state associations were (and a few still are) late in integrating their boards of directors. Moreover, many of the

state associations failed to inform their own minority owned broadcaster members that they were going to bring the MD/DC/DE Broadcasters case last year. This episode did little to enhance the reputation of the state associations among minority broadcast professionals. Hopefully this will cure itself with a tincture of time, so it should not be regarded as a permanent, fatal impediment to the usefulness of the state associations' websites.

> the same four or five companies were responsible for all of the listings. Often the listing companies are well known as equal opportunity employers who are willing to try every possible means to reach all qualified applicants. Apparently the state associations' efforts have the support of the EEO true believers but not the support of the anti-EEO rank and file. 235/

There are alternatives to trade association sites, such as company sites[236/] and equal opportunity sites.[237/] Like trade

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235/ MMTC Website Study, supra, p. 8.

236/ A company website is especially effective if the company is well known as an equal opportunity employer, thereby providing a good reason for those lacking Internet access at home to go to the library and visit the site. Particularly good examples are sites hosted by Cox Broadcasting and by Gannett, each of which operated exceptional companywide job recruitment programs years before the Internet began. One Internet recruiting expert notes that a company site "can be particularly effective in promoting equal opportunity if it would link its job posting to information on internal programs that benefit new recruits, such as corporate culture and career-development opportunities." Yoji Cole, "Online Job Postings: Why They Work, How to Get the Most Out of Them," DiversityInc.com, March 28, 2002 ("Online Job Postings") (quoting Jeff Dahltorp, Director of Sales and Marketing of IIRC, an Indiana consulting firm focusing on Internet recruiting strategies). Examples of career-development sites that accept links to company sites include www.jobcityusa.com, www.search25.com, www.minoritycareernet.com, www.blackeoejournal.com, www.minorityaffairs.com, www.diversityconnection.org, www.black-collegian.com, and www.minorityexecsearch.com.

237/ For a discussion of how these sites work, see "Online Job Postings," supra (quoting Dahltorp). See also Yoji Cole, "Companies Click on Web to Attract Diverse Applicants," DiversityInc.com, January 30, 2002 ("[m]any companies that use the Internet as a recruiting tool don't simply post their positions on a general market website such as Monster.com, or place their job opportunities on niche sites that focus their information to people of color. 'Niche' sites such as the National Association of Black Journalists are growing in popularity among human resource professionals.") Such sites, usually operated by seasoned personnel management

professionals, are often structured to provide confidentiality to job seekers. Many of these sites are operated by national organizations with high credibility as defenders of equal opportunity and opponents of discrimination. These sites often attract those who are less likely to use traditional industry job sites, where one's resume may not stand out in the crowd. See Online Job Postings, supra (reporting that Monster.com has six million monthly visitors, but only l2% are people of color.)

association sites, these sites' effectiveness may be impeded by the need for confidentiality. However, most large company sites and leading equal opportunity sites have been in operation longer than most of the state broadcast associations' sites. Thus, the company and equal opportunity sites have had more opportunity to generate the buzz of goodwill that follows when people secure jobs by visiting a site. But even company sites and equal opportunity sites should not be used exclusively, as shown below.

2. The nation lacks universal Internet service.

Even if supplemented by company sites and equal opportunity sites, an Internet-only approach to recruitment would be unfair in light of the persistence of very significant racial and economic disparities in Internet access, and on the low level of Internet penetration even without considering race and income disparities. NTIA's most recent study provided, inter alia, these statistics on Internet use rates by race and income for October, 1997 and September, 2001:[238/]

Group	1997 Rate	2001 Rate
Asian American/Pacific Islanders	35.8%	60.5%
Whites	37.6%	59.9%
African Americans	13.2%	39.9%
Hispanics	11.0%	31.6%
Households over $75K income	44.5%	78.9%
Households $25K-35K income	17.1%	44.1%
Households under $15K income	9.2%	25.0%

Thus, whether we regard the Internet glass as half empty or half full, at the end of the day the glass is not full or anywhere close to full. Disparities by race and income remain quite wide, _____

238/ See NTIA, A Nation Online: How Americans Are Expanding Their Use of the Internet (released February 6, 2002) (data as of September, 200l).

giving a huge headstart to those who have Internet access and web experience. Furthermore, technology-savvy Internet users are adept at using the Internet to instantaneously spread news of job openings to their personal circles of friends and relatives.[239/] In effect, the Internet is allowing inherently discriminatory word-of-mouth recruitment to be supplanted by the also inherently discriminatory practice of "word-of-mouse" recruitment.[240/]

Moreover, even the penetration rates attained by high-income users are still far below anything that could be regarded as universal service. Consider, for example, that if wealthy users' Internet penetration rates were telephone penetration rates, we would be facing a national telecommunications emergency.[241/]

3. Internet recruitment by trade organizations does not help new entrants secure the skills needed to enter the industry. Internet job postings tend not to be interactive: in particular, few job sites are designed to enable a job seeker in need of

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239/ See Amy Joyce, "Need Workers? Make an Offer - To Their Friends," Washington Post (Business Section), June 26, 2000, p. 5.

240/ With apologies to the late Victor Borge.

241/ When last measured in July, 2001, the national telephone penetration rate was 95.1%; it was 98.9% for households with incomes over $60,000, 95.8% for White households, 81.7% for households with incomes below $5,000, 91.3% for Hispanic

households and 90.3% for African American households. FCC, New Telephone Subscribership (released February 7, 2002). No one regards these statistics as a reflection of anything remotely representing universal service. Consequently, when the government needs to notify consumers of important information, it uses "snail mail" or advertisements in newspapers of general circulation. These means of communication are just as vital to any serious effort at broad outreach for something as important as broadcast employment.

counseling and advice to make face-to-face contact with a person in the industry who can provide career and job search advice and mentoring. Thus, Internet job postings, by themselves, can do little to fulfill one of the Commission's primary goals for Prong 3, which is to reach:

> persons who may not yet be aware of the opportunities available in broadcasting or cable or have not yet acquired the experience to compete for current vacancies. Such persons in the past may not have been aware of available opportunities because of word-of-mouth recruitment practices. Thus, interested members of the community will not only have access to information concerning specific job vacancies but also will be encouraged to develop the knowledge and skills to pursue them. 242/

This objective can best be achieved through personal contact, such as training, mentoring, or the networking and seminars attendant to community meetings and job fairs.[243/] By definition, the Internet interposes a layer of technology between live persons. Those entering or hoping to enter the industry need face-to-face counseling, mentoring and networking. For all of its power and potential, the Internet cannot provide that.

Our Proposal. The Commission should conclude that internet postings cannot yet be regarded as an effective exclusive means of broad recruitment, although it can be a Prong 3 option. Before the Commission could place greater reliance on state associations' website postings, the industry should satisfy these six tests:[244/]

242/ Second NPRM, supra, l6 FCC Rcd at 22852 ¶28.

243/ See l999 EEO Supporters Comments, pp. 230-232.

244/ With apologies to 47 U.S.C. §27l (l996).

1. All non-confidential and non-emergency jobs at the station are posted on the state association's website.

2. Most broadcast jobs in the state are posted on a state's website, thereby maximizing opportunities on the site and traffic on the site.

3. Each state association's website links to and lists jobs on a central, one-stop site.

4. The websites each link to and from several sites specializing in broad recruitment and equal opportunity.

5. Job candidates are able to post resumes or situations wanted ads on each of the websites at no charge.

6. The websites provide a mechanism by which new entrants can arrange interactive, face-to-face, in-person contact with those who can mentor them and help them prepare for careers in the industry.

The first two of these tests are unlikely to be satisfied easily.[245/] Nonetheless, if all six tests were satisfied, we would support the doublecounting of Internet postings under Prong 3 for companies with more than ten employees, thereby allowing Internet postings to be treated as satisfying two of the four selections a broadcaster would make from the Prong 3 menu.[246/]

245/ Unfortunately, NASBA may be aiming for a job posting rate far below 100%. See Remarks of Richard Zaragoza, Esq., counsel for NASBA, at the National Association of Broadcasters Convention, Las Vegas, NV, April 8, 2002 (expressing NASBA's intention to propose that the Commission have broadcasters "post the majority" of their jobs on industry websites.) Many broadcasters do much better, and there is no reason why all of them couldn't do better.

246/ We understand that NASBA will propose that the Commission itself should host a one-stop job site. This is really a commendable idea, although the Commission is not the right place to house such a project. As epitomized by the experience of the former Atomic Energy Commission, an inherent and irreconcilable conflict arises when an agency is responsible for promoting an industry and also for regulating that industry. It could be awkward if the Enforcement Bureau questions the adequacy of a broadcaster's recruitment efforts, and the broadcaster's defense is that it used the Commission's own website. A better place to house such a project would be in the National Telecommunications and Information Administration of the Department of Commerce.

3. Co-sponsorship of a nonprofit website, independent of the industry and focused on broad outreach, should be credited as a Prong 3 option

Website posting, by itself, is a suboptimal means of broad recruitment, but one Internet-based activity should receive credit as a Prong 3 option.

Many qualified persons regard traditional industry or even company sites with skepticism, sometimes because they have no way of knowing whether the company's personnel practices have been independently reviewed and endorsed by someone the person knows and trusts. Furthermore, many people are hesitant to go onto a traditional industry site because they are not sure they are prepared for the job market, or because they desire job or career counseling before exposing themselves to employers in an industry with which they are unfamiliar. Those fitting these descriptions include members of all races and both genders.

To reach these individuals, dozens of nonprofit organizations independent of the industry have established sites that offer advice on resume preparation and interviewing, as well as career and educational counseling. These sites are often co-sponsored by employers, and they typically feature links to company sites or mechanisms to facilitate applications for employment with the sponsoring company. The best such sites are operated by nonprofit

organizations that are independent of the industries to which they direct job applicants.

These sites often depend on corporate sponsorship to underwrite the cost of their job and career counseling.[247/] To facilitate the Commission's Prong 3 goal of assisting "persons who...have not yet acquired the experience to compete for current vacancies" to "develop the knowledge and skills to pursue them,"[248/] the Commission should authorize an additional Prong 3 option under which a licensee could receive credit for cosponsoring an independent, non-industry, nonprofit site, aimed at facilitating broad outreach, that provides counselling on the job search process and on career or educational development.

4. Equal employment training should be credited as a Prong 3 activity

We have long urged the Commission to pay greater attention to "second generation issues" in EEO. Our 1999 Comments stated:

> The first generation of EEO enforcement -- 1969 through 1998 -- focused entirely on recruitment for entry level positions....That task is still not over, but now minorities and women who did get in the door too often face a glass ceiling, especially at the upper management level. The time has come to enable minority and female employees to break through that ceiling and achieve commensurate with their abilities. 249/

Second generation issues -- work assignments, working environment, promotion, compensation, benefits and termination -- are even more critical now. The industry is shrinking, so recruitment has only limited potential as a means of promoting

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247/ See Online Job Postings, supra ("many people of color post resumes with associations of color, such as the National Association of Black MBAs (NABMBA), to get their foot in the door with a Fortune 500 company that sponsors the site. General Motors has such a partnership with the NABMBA.")

248/ Second NPRM, supra, l6 FCC Rcd at 22852 ¶28.

249/ l999 EEO Supporters Comments, supra, p. 234.

equal opportunity. Thus, broadcasters should be encouraged to systematically review retention, career advancement and job satisfaction issues. This means that broadcasters should learn which "best practices" have worked well elsewhere.

A promising development in recent years has been the formation of several outstanding firms that offer equal opportunity training, sometimes colloquially called "diversity training" although it deals with much more than "diversity" as that term is used in the FCC's world.[250/] These firms send experienced consultants into companies to train senior management on the latest trends and techniques that can ensure equal opportunity and prevent discrimination.[251/] Some of these training programs are truly outstanding, and they represent a creative private sector response to the need to address second generation issues in an evolving and sophisticated industry such as broadcasting.[252/] The Commission

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250/ See Women in Cable and Telecommunications Foundation and NAMIC, "Diversity" (2001) (recommending, inter alia, that employers "[h]ave all employees participate in diversity training" "[d]evelop a managing diversity program that fits your company's unique culture;" and "[m]ake achievement of diversity goals a part of performance evaluations and incentive packages.")

251/ Some of what passes for diversity training is little more than the ill-motivated suggestions of civil rights "defense" consultants who have taken a leaf from union busters. Their advice, usually available only for very high fees, consists of how to circumvent EEO regulations, conceal violations, avoid accountability, chill or retaliate against EEO complainants, and conduct legal warfare against civil rights plaintiffs and civil rights organizations. EEO credit

for this "activity" would be about as appropriate as voting rights credit for inventing the butterfly ballot.

252/ See 1999 EEO Supporters Comments, supra, pp. 234-41 (discussing such "second generation" issues as work assignments, working environment, promotion, compensation, benefits and termination).

should include this kind of training as one of its menu options in Outreach Prong 3.

5. Training of recruitment sources' job placement coordinators should be credited as a Prong 3 activity

In our experience, one reason some organizations are nonproductive as recruitment sources is that the person who handles job referrals for the organization does not know what broadcasters and cable companies need. Many lay people regard television, radio and cable as esoteric and extremely specialized, and most lay people have never set foot in a broadcast station or a cable system headquarters. Furthermore, many organizations' placement staff members have enormous responsibilities, and are unlikely to make a special effort to send referrals to companies whose contact with the organization is perfunctory.

Consequently, one practice we have found very effective is for broadcasters and cable companies to invite representatives of all of their recruitment sources over at least once a year, in a group, for a seminar, a tour of the facility, and an opportunity to meet the department heads. These presentations can focus on what each job is, what each person does, what skills and experience are required for each job, and what salaries are typically earned by persons working in each job. Many broadcast and cable executives are so close to their work that they erroneously assume that everyone in

the outside world knows all of these things. By sharing this information, recruitment sources would become more motivated and more capable of tracking down and referring qualified applicants.

VII. The Recordkeeping Requirements Are Valuable To The Public And Are Constitutionally Helpful

"There is an old adage in business: what gets measured - gets done."[253/] Being in the information business, broadcasters and cable companies are accustomed to maintaining and evaluating records of everything they do that is considered worthwhile. Broadcasters and cable companies can hardly complain that sales forecasts and ratings surveys are "burdensome," because these are considered worthwhile activities. EEO is too.

EEO review requires documentation, for as the D.C. Circuit has pointed out, "[d]iscrimination may be a subtle process which leaves little evidence in its wake."[254/] Recordkeeping and reporting make discrimination discoverable and remediable. The Commission's review of EEO documentation virtually the only means by which discrimination can be uncovered. Without records, it would be impossible for the Commission or the public to evaluate what the EEO program attempted to do, much less what it achieved. All discriminators would go free.

In civil rights, the Commission trusts broadcasters for seven years and 364 days without significantly overseeing their EEO compliance activities. During this time, broadcasters use valuable public property with almost no

oversight. At license renewal time, then, the Commission should "trust but verify." Failure to

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253/ Phil Condit, Chairman, Boeing Corp., quoted in Fair Employment Report, January 27, l999, p. 9.

254/ Bilingual Bicultural Coalition on the Mass Media v. FCC, 492 F.2d 656, 659 (D.C. Cir. l974) ("Bilingual I").

maintain records can give rise to an inference of discrimination,[255] and as the Commission has found repeatedly, providing falsified records is a leading signal of possible discrimination.[256]

Although the state associations invited the D.C. Circuit to hold the First R&O's recordkeeping requirements excessive,[257] the Court declined to do so.[258] The Second NPRM also recognizes the essential nature of recordkeeping and verification in EEO enforcement.[259]

We address, first, the question of whether certain EEO data not used or useful in EEO enforcement should be kept secret for the first time in 31 years.[260] We then address whether the records proposed by the Second NPRM for EEO enforcement are sufficient for that purpose.[261]

255/ Failure to keep appropriate records may constitute "spoilation" -- especially if maintenance of the records is mandated. See Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 843 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978).

256/ See, e.g., Dixie Broadcasting Co. (HDO), 7 FCC Rcd 5638 (1992); WXBM-FM, Inc. (HDO), 6 FCC Rcd 4782 (1991); Albany Radio, Inc. (HDO), 97 FCC2d 519 (1984); Metroplex Communications of Florida, Inc. (HDO), 96 FCC2d 1090 (1984).

257/ State Associations Main Brief, supra, pp. 24-25.

258/ MD/DC/DE Broadcasters, supra, 236 F.3d at 18.

259/ Second NPRM, supra, 16 FCC Rcd at 22853 ¶32 ("the justification for this documentation is self-evident. An employment unit must be able to demonstrate that it in fact took the steps required by our rules....This data is valuable to us and the public to validate whether the employment unit

is achieving broad outreach and for the employment unit to self-assess its recruitment efforts.")

260/ See pp. 122-36 infra.

261/ See pp. 137-47 infra.

A. The Commission should continue to collect and disseminate Form 395 data

Form 395 was created in 1970 and first used in 1971.[262] It sets out, every year, a snapshot of the employment of Whites, minorities, men and women in various job categories.

In the course of developing the 1971 EEO regulations, the Commission explained why enforcement data was needed. Its rationale has stood the test of time:

> [statistical data] is useful to show industry employment patterns, and to raise appropriate questions as to the causes of such patterns. Thus, if none of the broadcast stations in a city with a large Negro population had any Negro employees in other than menial jobs, a fair question would be raised as to the cause of this situation. The absence of data on the number of Negroes qualified for other positions does not affect the legitimacy of the query, unless we are to assume that there are no Negroes qualified for other than menial positions, an assumption we are not prepared to make. 263/

In a footnote, the Commission stated that inputting the data on the annual employment reports (Form 395) into its [then-new] computer would "provide ready access to the information contained on these forms, and will allow ease of data storage for cumulative or comparative purposes."[264]

For thirty years, the Commission's EEO data compilation and disclosure procedures have served the industry, the public and the Commission well. No broadcaster or cable company has ever claimed that it endured a cognizable harm from the dissemination of Form 395 data. Nor could such a claim be made, since the data is not used for enforcement purposes.

262/ See 1970 EEO R&O, supra.

263/ Id. at 431 ¶4.

264/ Id. at 432 n. 2.

Nonetheless, some broadcasters maintain that that the public and even most Commission staff should be prohibited from continuing to know the statistical information contained on this form, and the Commission has sought comment on this question.[265/] In particular, the NAB proposed a so-called "tear off" sheet, so that the identity of the broadcaster filing the data would not be known to anyone but the FCC clerk who initially logs in the data.[266/]

This proposal is a solution in search of a problem. Data secrecy is unreasonable if the public's need for the information outweighs broadcasters' claimed need for confidentiality. In this instance, the NAB's claims of harm were entirely speculative, and the equities in favor of continued dissemination of information are very powerful. Indeed, inasmuch as they are in the business of journalism, broadcasters should particularly understand and embrace the need for the widest, most transparent public availability of data submitted to the government by those -- like themselves -- who receive federal benefits.[267/]

265/ Although recognizing that nothing in the MD/DC/DE Broadcasters "suggests that the collection of the FCC Form 395-B data for the limited purposes for which it is intended is subject to strict scrutiny or is unconstitutional" the Commission has asked "can or should we allow these forms to be submitted anonymously?" Second NPRM, supra, 16 FCC Rcd at 22858 ¶50.

266/ Petition for Partial Reconsideration and Clarification, filed by the National Association of Broadcasters in MM Docket No. 98-204 (filed March l6, 2000) at l6.

267/ There are some good reasons for data secrecy, but they do not apply here. Under the Privacy Act, 5 U.S.C. §552(a), names of individuals ought not to be made public in some contexts without consent. Under the Freedom of Information Act, 5 U.S.C. §552(b), the confidentiality of trade secrets can be preserved. However, Form 395 data is aggregate data, and it does not include trade secrets.

1. Respondent-specific data is valuable to scholars and to the Commission

Adoption of the "tear off sheet" proposal would be the rare instance when the genuine interests of science were subordinated to an imagined need of business.

The continued availability of respondent-specific Form 395 data is essential for scholarship in this area. The "tear off sheet" proposal would prevent independent scholars, or the Commission's own research staff, from verifying the data's accuracy or from inquiring of licensees into the meaning of data trends within or among reporting units over time.

In the 1999-2000 rulemaking, the Commission rejected the "tear off" sheet proposal because it would have been inconsistent with well established social science principles that call for the continued retention of the source of raw data to allow for validation of the data and to facilitate future research using the same database. In particular, the Commission decided not to separate the identity of the station from its annual employment report so that it could follow up with the station should its filing, upon review, prove incomplete, and so that it could analyze trend data.[268/]

The Commission's holding was consistent with scholarly practice. It is axiomatic in social science research that even when data is kept confidential, a researcher "may need to identify survey respondents initially so [she] could recontact

them to verify that the interview was conducted and perhaps to get

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268/ See Recon, supra, 15 FCC Rcd at 22558-60 ¶¶35-42.

information that was missing in the original interview. Thus, knowing respondents' identities may be vital to quality control in data collection."[269/] A scholar doing a longitudinal study may need to followup with licensees years after the data was originally submitted.

Since 1975, there have been at least a dozen academic and government research studies on broadcast EEO trends, none of which would have been possible if the identity of the respondents had been anonymous. Recent studies made possible by the respondent-specific attribute of the Form 395 database include:

> Dwight Brooks, George Daniels and C. Ann Hollifield, "Television in Living Color: Racial Diversity in the Local Commercial Television Industry," 2002 Howard Journal of Communications _____ (in press)
>
> Fonda Leigh Whittaker, "Reflective Images: Personnel Diversity in the Public Broadcasting Industry," Department of Telecommunications, University of Georgia (2000)
>
> Taylor Alan Sikes, "Race, Gender, and Sound: The Effects of Twenty Years of Affirmative Action Policies on Diversity in the U.S. Radio Industry," Department of Journalism, University of Georgia (2000).

A key attribute of the Form 395 database that depends entirely on public disclosure of the respondent's identity is the ability to correlate EEO statistics with outreach initiatives. This type of research is essential in illuminating which EEO initiatives are effective and which are not. Continued requirements to use ineffective procedures

would be unfair to the industry, leading to rumblings that the Commission has imposed "burdensome" requirements

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269/ Earl Babbie, The Practice of Social Research (7th edition, Wadsworth Publishing Company, 1995) at 452 ("Babbie"). Babbie is the standard graduate research methods text; thus, official notice is appropriate.

that are no longer useful. Moreover, the ability to fine-tune Commission rules over time is a requirement imposed by Congress and the Courts,[270/] and continued review of these requirements may be necessary for constitutional purposes.[271/] Thus, broadcasters should embrace the dissemination of the data required for correlational and time-series research.

One example of this kind of research was instrumental in framing a key outcome of the First R&O. MMTC matched EEO programs (Form 396) with EEO profiles (Form 395) for every radio station in Tennessee in 1996. A statistician then performed an analysis of variance, treating minority employment as a dependent variable and each of several types of EEO outreach activities as independent variables. This analysis led to the conclusion that one of the outreach activity -- job fairs -- appeared to produce a measurable jump in minority employment.[272/] This finding flatly contradicted what MMTC had previously believed, but nonetheless it was reported in the 1999 EEO Supporters Comments,[273/] and it was cited by the

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270/ Cf. Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1038 (D.C. Cir. 2002) (holding that Commission's decision that a rule should be retained is judicially reviewable.)

271/ Cf. Fullilove v. Klutznick, 448 U.S. 448, 513 (1980) (a race-conscious program should be limited so that it "will not last longer than the discriminatory effects it is designed to eliminate.")

272 See 1999 EEO Supporters Comments, supra, pp. 230-33 (discussing the Tennessee Study).

273/ 1999 EEO Supporters Comments, supra, pp. 193-201.

Commission when it included job fairs as three of the twelve specific choices in Option A of the 2000 regulations.[274/] None of this would have happened if Form 395-B data had been secret.

Another major deficiency of the data set that would result from the publication only of aggregate, anonymous data is the inability to render comparisons among markets and among states. The Commission has specifically encouraged broadcasters to undertake joint recruiting efforts,[275/] and some broadcasters have contended that they should be permitted entirely to rely on joint or even outsourced outreach initiatives. Thus, data analysis that compares employment trends in one market or state with those in another market or state are essential fruits of any database the Commission and the public might find useful.[276/]

The Commission ought to have robust access to EEO data and to the scholarship that data makes possible. There is little dispute

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274/ First R&O, supra, 15 FCC Rcd at 2368 ¶84 and 2372 ¶101.

275/ See Second NPRM, supra, 16 FCC Rcd at 22853 ¶31 (encouraging joint recruitment and outreach efforts). We note that the Commission has long presented its annual EEO trend reports on a statewide basis, thereby facilitating state-to-state data comparisons.

276/ In theory, anonymous data could be aggregated by market, but such aggregation would frustrate statistical analysis because it would not disclose whether apparent differences between markets, or in one market over time, can be accounted

for by the behavior of a single reporting unit. Owing to consolidation, the number of EEO reporting units is declining; thus, a wide fluctuation in the data set for a single unit can affect the results for the entire market in statistically significant ways.

that race and gender data collection is necessary for the government to identify and remedy discrimination.[277/] The Commission is obliged by Congress to ensure that the industry operates without discrimination.[278] It is required to eliminate market entry barriers,[279/] and it must ensure that its regulations are effective, not excessive, and still needed.[280/]

For these reasons, the Commission should avoid any unnecessary restraints on the availability and transparency of EEO data.

2. The mere act of publishing EEO data does not "pressure" a regulatee to discriminate

In 200l, the state associations invited the D.C. Circuit to hold that even the FCC's mere act of publishing EEO data could somehow "pressure" a regulatee to discriminate.[281/] The Court did not accept the state association's invitation, and most likely with good reason: there was no evidence that in the past thirty years, a single broadcaster was foolish enough to think that because it had to file Form 395-B, the government expected it to hire

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277/ See EEOC v. Shell Oil Co., 466 U.S. 54, 80-8l (l984) ("Shell Oil") (Title VII data submission helps the EEOC to "identify and eliminate systemic employment discrimination.")

278/ 47 U.S.C. §l5l. Recordkeeping requirements are often imposed specifically to ensure that requirements analogous to Section l5l are observed. See, e.g., 28 U.S.C. §l863(d) (requiring courts to maintain jury service records by race).

279/ 47 U.S.C. §257 (l996).

280/ See Fox Television, supra, 280 F.3d at l038.

28l/ State Associations Main Brief at 26.

preferentially.[282/] Nor could such evidence have been provided, because on its face Form 395 is not race preferential. Form 395 no more "pressures" anyone to break the law than the Census,[283/]

282/ Indeed, in the First R&O, the Commission had unequivocally and repeatedly said it would only use Form 395-B data to track industry employment trends, and that such information would not affect any individual broadcaster. Id., 15 FCC Rcd at 2418 ¶225 ("[w]e...state in the clearest possible terms that we will not use the [Form 395-B] data to assess broadcasters' or cable entities' compliance with our EEO rules" (emphasis in original)). As the Commission has recognized, nothing in the MD/DC/DE Broadcasters "suggests that the collection of the FCC Form 395-B data for the limited purposes for which it is intended is subject to strict scrutiny or is unconstitutional." Second NPRM, 16 FCC Rcd at 22858 ¶50.

283/ It is well established that government collection of data about the racial composition of an industry or the population in general is constitutionally permissible. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) ("[t]he equal protection clause does not forbid classification. It simply keeps decision makers from treating differently persons who are in all relevant respects alike"); Caufield v. Board of Educ. of the City of N.Y., 583 F.2d 605, 611 (2d Cir. 1968) ("the Constitution itself does not condemn the collection of this data," referring to a local census of the racial and ethnic breakdown of public school employees.) See also Sussman v. Tanoue, 39 F. Supp.2d 13, 25 (D.D.C. 1999) ("[c]ourts have not found requirements to collect data about the racial and gender make-up of a workforce to violate the Constitution"); cf. Jury Selection and Service Act of 1968, 28 U.S.C. §1869(h) (requiring federal government to "elicit" the race of all individuals considered for jury duty). In Morales v. Daley, 116 F.Supp.2d 801 (S.D. Texas 2000) ("Morales"), Judge Melinda Harmon ruled the Adarand III "does not deal with government collection of data on race" and held that U.S. Census collection of racial data is constitutionally permissible. Judge Harmon cited U.S. v. Moriarity, 106 F. 886 (S.D.N.Y. 1901) ("Moriarity") for the proposition that the Necessary and Proper Clause enables Congress to ask a variety of demographic questions in the Census. Morales, 116 F.Supp. at 810. Moriarity affirmed the government's need to "know

something, if not everything, beyond the fact that the population of each state reaches a certain limit...when it is considered what is the dependence of this population upon the intelligent action of the general government." Id., 106 F. at 891.

or Title VII,[284/] "pressure" anyone to do so. Like an EEO-1 Form used in connection with Title VII, Form 395-B is set out in columns that specify Whites, minority groups, men and women. Such a form nowhere suggests or implies preference.[285/]

The Commission has declared unequivocally that Form 395-B ("output" data) may not be used to allege that a broadcaster failed adequately in delivering an "input," recruitment.[286/] This declaration by the Federal Communications Commission is entitled to

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284/ The First Circuit has expressly rejected the theory that racial statistics cannot be collected to foster nondiscrimination in employment. See U.S. v. New Hampshire, 539 F.2d 277, 280 (lst Cir. l976), cert. denied, 429 U.S. l023 (l977), which rejected a challenge by the state of New Hampshire to a requirement that it file an EEO-4 form containing statistics on the racial makeup of employees of the state. The First Circuit noted that this kind of information "is often highly useful when an agency or court attempts to make the often difficult inference that illegal discrimination is or is not present in a particular factual context." See also id. ("[s]tatistical information as such is a rather neutral entity which only becomes meaningful when it is interpreted. And any positive steps which the United States might subsequently take as a result of its interpretation of the data in question remain subject to law and judicial scrutiny.")

285/ Thus, if someday there should ever be an outbreak of reverse discrimination, Form 395-B data could easily be used by those who oppose this illegal practice. Indeed, respondent-specific racial data has been used, more than once, in the field of higher education by those who object to race-conscious admissions policies. See, e.g., Gratz v. Bollinger, l22 F.Supp. 2d 8ll (E.D. Mich. 2000) and l35 F.Supp. 2d 790 (E.D. Mich. 200l), petition for initial hearing en banc granted, 277 F.3d 803 (6th Cir. 200l). Yet no one suggests that civil rights opponents' use of admissions data in this way is unconstitutional because such use "pressures"

universities to abandon their diversity-based admissions policies.

286/ See First R&O, supra, at 2418 ¶226 (promising that if it receives "a petition against a broadcaster based on the Form 395-B employment profile data" from a third party, it will "dismiss any such petition summarily.")

respect.[287/] The EEO Supporters understand what the FCC has declared. None of them would or could invoke a broadcaster's Form 395-B data, publicly or privately, to ask the broadcaster to hire race-consciously.[288/]

3. A compromise proposal for Form 395 data dissemination: hold these employment reports in confidence for three years

We have developed a proposal to resolve the Form 395 issue in a way that achieve two key objectives of the opposing camps: (1) limit disruption of scholarship; and (2) ensure that Form 395 data could not be used for EEO compliance purposes even in the very unlikely event that the Commission one day entertains such use.

The heart of our proposal is that the Commission would hold these employment reports in confidence for three years, thereby preserving their value for scholarship while rendering them valueless for public or private advocacy of race-conscious hiring.

Here is how this would work:

1. There is no need to hold Form 395-B data confidential if a broadcaster does not object to its publication. Consequently,

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287/ The fear that an agency will not obey its own rules is not a valid reason not to have rules. See Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1082 (D.C. Cir. 1974) (noting that it is a "well settled rule that an agency's failure to follow its own regulations is fatal to the deviant action.") See also, e.g., Vitarelli v. Seaton, 359 U.S. 535,

539 (1959), Service v. Dulles, 354 U.S. 363, 379 (1957) and Gardner v. FCC, 530 F.2d 1086, 1091 (D.C. Cir. 1976).

288/ Even if an organization were to use Form 395 data as part of an effort to advocate race-conscious hiring, such private use of government data would not be state action and thus would not affect the validity of the Commission's rules. See Lugar v. Edmundson Oil, Inc., 457 U.S. 922, 939 n. 21 (1982) (declining to hold that a private party's "mere invocation of state legal procedures" constitutes "joint participation" with state officials so as to bring the private party's action within the "under color of law" requirement of 42 U.S.C. §1983.)

broadcasters who do not object to public disclosure of Form 395-B would make it available in the customary manner.

2. If a broadcaster objects to public disclosure, it could submit the data with a request for waiver of disclosure. The broadcaster would not have to give a reason for such a waiver. Neither requesting a waiver, nor abstaining from requesting a waiver, would give rise to adverse inferences in the EEO compliance review process.[289/]

3. All waiver requests would be granted (with one exception discussed in ¶4 below). Once granted, the data would be confidential in that it would not be publicly disclosed, but the Commission's recordkeeping staff could examine it subject to internal procedural safeguards in the manner by which it reviews any other material submitted in camera. In this way, if the Commission's recordkeeping staff needs to reverify the data with a respondent, it would be able to do that in confidence.

4. If the Commission's investigative staff requires the data because it is pursuing an investigation of whether the broadcaster may be engaging in intentional discrimination, the waiver would be overridden or terminated.[290/] Such an investigation could take

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289/ In this way, no one could make the silly argument that seeking a waiver implies that the broadcaster discriminated, and no one could make the equally silly argument that not

seeking a waiver means the broadcaster acquiesced to "pressure" to reverse- discriminate.

290/ To be sure, the Annual Trend Reports could be released earlier with the names of respondents not identified in the reports. We considered this approach, but rejected it because consolidation has overtaken its usefulness. Due to consolidation, there are fewer reporting units; thus, in all but the largest markets, it would be easy to figure out which report belongs to which company. Of course in very small markets (e.g. those with only one reporting unit) this approach would have had no usefulness at all.

place on the Commission's own motion in response to information it possesses, or it could take place through the traditional Bilingual process. This approach essentially follows the procedures used by the EEOC and OFCCP with respect to EEO-1 data. This "discrimination investigation" exception to confidentiality appears to be required by the D.C. Circuit's Bilingual II decision,[291/] inasmuch as hiring statistics are a nondispositive but obviously probative piece of evidence relevant to whether an employer discriminates in hiring.[292/]

5. As with most business data, any argument for secrecy loses its force as the data becomes old. Once the data is no longer current, it would lose its potential to be used to draw inferences about EEO compliance. Therefore, after three years, all Form 395 data, identified by respondent, would be publicly released

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291/ Bilingual II, supra, 595 F.2d at 630 ("a substantial statistical disparity, especially when coupled with a languishing affirmative action plan, raises questions as to whether the station's poor EEO performance owes to inadvertence, or to intentional discrimination.") This language may be quaint when read from the present vantage point, but the Court seems clearly to have recognized that weak outreach coupled with a gross disparity in minority employment "raises questions" as to whether the licensee is an intentional discriminator. That is a fair point, and Bilingual II has not been overruled. Plainly, and in light of Lutheran Church, the Commission now would need to be presented with direct evidence of discriminatory intent in order to take the next step and determine whether statistics in its possession tend to corroborate or contradict this evidence.

292/ See, e.g., Alabama v. U.S. 304 F.2d 583, 586 (5th Cir.), aff'd, 371 U.S. 37 (1962) ("statistics often tell much, and Courts listen.") See also Shell Oil, 466 U.S. at 80-81 (Title VII data submission helps the EEOC to "identify and eliminate systemic employment discrimination.")

and the annual summaries of that data (the EEO Trend Reports) would also be released.[293/]

6. If a scholar needs to use the data within the three-year confidentiality period, she could request a scholarship authorization from the Office of the General Counsel. Such an authorization would enable the scholar to use the data under the same confidentiality protocols applicable to the Commission's own research staff.

This is not a perfect approach, and we would much prefer full public disclosure such as the Commission has administered for thirty years. However, we believe it to be a fair solution to a difficult problem. It has these advantages:

First, it would give broadcasters the voluntary option of public disclosure or nondisclosure with no adverse consequences associated with making either choice.

Second, it would ensure that the data would not remain confidential any longer than necessary, in keeping with well established principles of open government and with FOIA's presumption favoring public availability of information.

293/ The D.C. Circuit realizes that some issues can be resolved in no other way but to draw a line somewhere, and that just because a line is drawn does not render the agency's decision arbitrary and capricious. See, e.g. Sinclair Broadcast Group, Inc. v. FCC, 2002 U.S. App. LEXIS 5965, 5990 ("[w]here issues involve 'elusive' and 'not easily defined' areas...our review is considerably more deferential, according broad leeway to the Commission's line-drawing determinations" (citations omitted)). In this instance, three years seems to be about

the right place to draw the line. A longer period of secrecy would not make Form 395 data more useless for advocacy of race-preferential hiring, although it would materially and needlessly impede the work of scholars.

Third, it would enable the Commission's staff to use the data freely for all legitimate purposes.

Fourth, it would not materially disrupt the work of scholars. Even if a scholar prefers to wait three years until the data is in the public domain, a three year wait to do time series or comparative analysis would not produce dated empirical results.[294/]

Fifth, the three year confidentiality period guarantees that the Form 395-B data would be of no value in connection with the Commission's and the public's review of EEO outreach compliance, whether at renewal time or any other time. Even under the very remote scenario under which the Commission chooses to consider this data, the data would be too stale to be useful, being in fact two full years more stale than the other data the Commission requests at renewal time.

We offer this approach in the spirit of compromise so that the Commission may get on with the business of putting rules in place that will easily withstand any ill-advised efforts to seek judicial review, and that will still be useful to the public if they are strictly enforced.

4. The Form 395 issue should be severed and placed in a separate docket

Some opponents of the EEO rules will assert that broadcasters may derive the misimpression that Form 395 is somehow connected to

294/ Major labor force adjustments occur at a relatively glacial pace; thus, research derived from labor statistics typically enjoys a shelf life of several years. That is why researchers have long managed to adjust to the U.S. Census' three year delay in the production of its major decennial reports.

EEO enforcement simply by virtue of the fact that Form 395 is being discussed in this proceeding. We do not see how such a misimpression could be derived in good faith. After all, how many times and in how many ways does the Commission have to emblazon in its decisions that Form 395 data will not be used for EEO compliance review?[295/]

Nonetheless, to put to rest that asserted misimpression, the Commission should sever the Form 395 issue from this proceeding and address Form 395 in a separate order and in a new and different docket.[296/] Through such severance, the Commission could make it impregnably, Shermanesquely clear that Form 395 is for research rather than for enforcement.[297/]

295/ See, among many other such patient pronouncements, First R&O, supra, 15 FCC Rcd at 2418 ¶225 ("[w]e...state in the clearest possible terms that we will not use the [Form 395-B] data to assess broadcasters' or cable entities' compliance with our EEO rules" (emphasis in original)).

296/ Such a docket would focus attention on scholarship relating to EEO and labor force trends, as opposed to enforcement issues. Another of our proposals that may belong in such a docket involves the prospective role of the EEO Branch in conducting time series and empirical research with the aid of Form 395 and other data. See pp. 148 infra.

297/ Placing generally unrelated issues in different dockets is preferable to manifesting an intention to have issues in the same docket be treated as severable for judicial review purposes. The Commission certainly should avoid another scenario in which severance by a court "would severely distort the Commission's program and produce a rule strikingly different from any the Commission has ever considered or promulgated." MD/DC/DE Broadcasters, supra, 236 F.3d at 23 (explaining refusal to sever Option B from the 2000 rules.)

B. Some of the recordkeeping requirements can be improved

1. Program elements should be reported retrospectively and applied prospectively

Form 396 should ask whether the initiatives reported thereon in the past tense will be continued throughout the coming license term, or whether modifications or additions are contemplated. Licensees should understand that a renewal application EEO Program, like an assignment application EEO program, is a promise, not just a report.[298/] This clarification is essential in order to enable the Commission to avoid any misunderstanding when it validates licensee compliance under its proposed new approach of requiring the contact information of recruitment sources.[299/]

2. Nonracial data on applicants' recruitment sources, and on interviewing, should be retained

The Second NPRM proposes that some information on applicant source data should be reported and retained. It proposes to delete from former Option A the requirements that EEO outreach reports identify recruitment sources used to recruit for "each such vacancy," the source that referred the person "hired for each _____

298/ The D.C. Circuit has criticized the Commission for failing to require licensees to do what they promised in their most recent renewal application. Tallahassee NAACP v. FCC, 870 F.2d 704 (D.C. Cir. 1989) (noting that a licensee "added" a new source for future recruitment -- a source the licensee had promised to use in its previous renewal application but had not actually used.)

299/ Second R&O, supra, 16 FCC Rcd at 22854 ¶36. Validation should be undertaken under a rule of reason. Recruitment source staff do not remain in their jobs forever; moreover, a licensee is expected to tailor and improve its program over time. Nonetheless, if a licensee proposes to contact twenty organizations, and two years later it appears that none of these organizations ever received a job notice, additional inquiry would be appropriate.

vacancy," and the "data reflecting the total number of persons interviewed for each vacancy and the total number of interviewees referred by each recruitment source utilized."[300/] Instead, the Commission now proposes to seek an aggregate list of "recruitment sources used to fill those vacancies," although it is not clear from the wording of this whether the Commission expects licensees to match sources to each vacancy.[301/] Furthermore, the Commission would seek the "address, contact person, and telephone number of each recruitment source." Both the former rules and the new proposal contemplate the submission of lists of fulltime vacancies filled during the preceding year, as well as a description of supplemental recruitment initiatives during the previous year.[302/]

The Commission seeks comment on the proposed revisions of the 2000 rules, including whether broadcasters and cable entities should retain "information such as the recruitment sources of interviewees and/or hires" and whether this data should be included in the annual public file report.[303/] In the paragraphs numbered (1) through (4) below, we comment on each element of the Commission's reporting proposals. In the paragraph numbered (5), we advance an additional reporting proposal.

(1) Sources Used To Recruit For Each Vacancy. It makes a huge difference whether the Commission expects recruitment

sources to be matched with vacancies, or will allow broadcasters merely to

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300/ Id. at 22854 ¶¶34 and 36.

301/ Second NPRM, supra, 16 FCC Rcd at 22854 ¶¶34 and 36.

302/ Second NPRM, supra, 16 FCC Rcd at 22854 ¶¶34 and 36.

303/ Second NPRM, supra, 16 FCC Rcd at 22854 ¶¶34 and 36.

provide a list of sources variously used to recruit for unspecified vacancies. The former rules required "the recruitment source(s) utilized for each such vacancy."[304/] The new proposal speaks only of "recruitment sources used to fill those vacancies."[305/] If the new language is intended to have the same meaning as the former language, we have no objection to it. But if the new language means that a licensee can simply write down a list of sources, even though most of them are used only to fill low-level positions and none of them is used to fill management or sales positions, the rules would lose much of their strength.

Without knowing which sources were contacted for which jobs, it would be impossible to determine whether a broadcaster claimed to be recruiting broadly while actually doing so only when (for example) it has to hire a receptionist or a janitor, rather than for positions carrying real influence.[306/] Furthermore, it would undermine the integrity of the rules if broadcasters did not recruit as broadly as feasible when a key employee must be replaced quickly or in a confidential process.[307/] Broadcasters notify recruitment sources mostly through e-mail lists, and these e-mails can be stored electronically. The act of retrieving and reporting this information every year could not be more cost-effective in

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304/ See Second NPRM at 22854 ¶34.

305/ Id. at 22854 ¶36.

306/ See, e.g., Rust Communications Group, Inc. (HDO), 53 FCC2d
355, 363 (l975) (designating hearing where, inter alia, licensee said it would recruit minorities only "when suitable openings exist.")

307/ See pp. 87-96 supra (discussing how some degree of broad recruitment is possible under these circumstances).

ensuring that a broadcaster self-assesses the effectiveness and genuineness of its recruitment efforts.

(2) Applicant Source Data. Applicant source data -- along with data on interviewees and selectees -- has been retained for a generation without controversy and without imposing needless or excessive work on the industry. The requirement that broadcasters maintain applicant source data is race-neutral, being analogous to electoral data based on party affiliation or public school pupil assignment data based on income or geography.

Applicant source data is useful for two purposes that are essential to a meaningful EEO regulatory program.

First, broadcasters have long been expected to review recruitment source lists as part of self-assessment, to be sure the sources are effective in generating applications.[308/] Sometimes, recruitment sources are simply unable to produce applicants; other times, the sources have applicants but the source and the broadcaster have poor communication with one another, resulting in zero applicant flow from that source.[309/] A Commission requirement

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308/ See Second NPRM, supra, 16 FCC Rcd at 22855 ¶39 (finding that the annual public file report "will be useful to broadcasters by enabling them to identify and correct any problems in their programs in an expeditious manner. By monitoring the success of their EEO efforts throughout the license term, broadcasters will be able to avoid major problems at renewal time.")

309/ This may reflect nothing more than a wrong phone, fax or e-mail address, or the recruitment source's designation of a new person to handle applicant referral requests. On other occasions, the broadcaster may have done little to assure the source that it would be a good use of the time of the source's employees or volunteers to supply the broadcaster with job applicants.

that broadcasters retain and report applicant source data certainly will enhance the likelihood that broadcasters will use the data to update and refine their referral lists.

Second, applicant source data is essential for compliance purposes. Applicant source data is the principal fount of information elicited in almost every Bilingual investigation. These investigations have usually resulted in requirements that broadcasters engage in broader recruitment, and the public has been much the better for this.

Without applicant source data, verification that broadcasters recruited at all would be impossible. It should be deeply troubling that in the 1990s, broadcasters very often failed to recruit as promised, and that all too often the nearly exclusive use of word-of-mouth recruitment was the norm rather than the exception.[310/] The Commission's tentative decision to require the retention of data on recruitment sources' addresses, contact

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310/ The Commission has long been aware that notwithstanding broadcasters' renewal-time promises to undertake recruitment, little or no recruitment actually happens in many cases other than by word-of-mouth. See 1994 EEO Report, supra, 9 FCC Rcd at 6314-15 ¶79 ("despite our requirements, in many of these cases, for which we have issued sanctions, positions were filled without any recruitment having taken place. Given the foregoing, we believe that a continuing need exists for EEO enforcement in the communications industry" (fn. omitted)). MMTC's 1996 Tennessee Study, supra, found that six percent of Tennessee radio renewal applicants in 1996 reported the use of no referral sources at all. See 1999 EEO Supporters Comments, supra, p. 198. Anecdotal evidence also suggested that many broadcasters were simply filing EEO

recruitment plans with the Commission and then throwing them away after the renewal was granted. Id., pp. 225-26 n. 336 (reporting that about 30 south Florida broadcasters in the l990s listed the Miami-Dade (Florida) NAACP as a recruitment source, although actually only one always sent job notices and three sent them periodically.)

(n. 3l0 continued on p. l42)

persons and telephone numbers nicely solves that iceberg of a problem.[311/] It ensures that the Commission, and parties to Bilingual investigations, can verify the representations of apparent law violators. This proposal is well considered and should be adopted.

310/ (continued from p. 141)

The 1999 MMTC study "Verification of Recruitment Sources" is discussed on p. 80 n. 183 supra. Dr. Audrey J. Murrell, Associate Professor at the Katz School of Management, University of Pittsburgh, reviewed the recruiting practices of 503 radio stations, in 20 markets, that filed license renewal applications in 1997. Recruitment sources identified in the applications were contacted to determine whether they had heard from the stations claiming to have used them. Dr. Murrell found that only 12% of the valid sources listed on the renewal applications could be verified. Among those that could be verified, only 14% confirmed that they had been contacted by the station with recruitment information. Dr. Murrell also found that of the sources that could give a "Yes" or "No" answer to the question "was your organization contacted in 1997 and 1998," 13 (24%) said "No." Thus, far too many licensees were telling the Commission one thing but doing another. Dr. Murrell recommended that Form 396 should "provide guidelines for the standardization of information collected (such as specific identification of the source, contact person, frequency of contact[.]"

311/ Second NPRM, supra, 16 FCC Rcd at 22854 ¶36. See 1999 EEO

Supporters Comments, supra, pp. 249-50 (urging that broadcasters should "identify their referral source contacts and phone numbers on Form 396, much as broadcasters identify tower site owners on Form 301. This simple, cost-free procedure would enable the Commission and the public to independently verify the accuracy of the information provided, and discourage the common practice of listing the names of large national organizations (typically NAACP or NOW) knowing that verification would then be impossible....This is the single most cost-effective modification to Form 396 the Commission could make.") We also recommended the Commission, and reiterate, that the Commission should place on Form 396 the following language:

> **Misrepresentations about job referrals are considered very serious and may result in the denial of this application. Please carefully verify that you have actually sent job notices to each entity you identify below.**

Id. at 250 n. 365. We restate that recommendation here.

(3) Sources Of Interviewees. The Second NPRM proposed to delete the requirement that broadcasters report the recruitment sources for interviewees.[312/] This proposal should be rejected. As the Commission noted in the Second NPRM, "[u]nder our former rules, we required data concerning referral sources for interviewees and hires because we believed this information was necessary in order for the employment units to ensure that they were in fact achieving broad outreach."[313/] Data on interviewees would be useful in ascertaining whether a broadcaster was collecting written applications from all sources, but then simply throwing away applications not derived from prearranged word-of-mouth channels. Maintaining and reporting interviewees' recruitment sources would raise no constitutional concerns, since it would not reflect race.[314/] Interviewee data would have considerable value in showing whether a licensee was falsely holding out to referral sources and applicants that they actually had a fair chance of being considered for employment, while, in reality, no one who is not referred word-of-mouth from a favored

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312/ Second NPRM, supra, 16 FCC Rcd at 22854 ¶34. The Commission made no proposal on whether this information should even be retained, although it did ask this question of commenters. Id. at 22854 ¶32.

313/ Id., citing First R&O, supra, 15 FCC Rcd at 2378 ¶118.

314/ None of the recruitment information being reported would identify the race of an applicant or interviewee. Thus, it is irrelevant, for constitutional purposes, whether an

interview is considered simply the oral component of the process by which applicants perfect and present their qualifications (as we believe) or whether the selection of interviewees is more like hiring. Furthermore, a recruitment source has no race; thus, data on recruitment sources cannot be regarded as an indirect way to inject race into the program. See pp. 80-81 supra (noting that a newspaper can be read by a person of any race.)

source is ever granted an interview.[315/] In broadcasting, it is difficult to conceive of a job applicant being able to perfect her application without the oral component of an interview. Broadcasting is both a verbal and a "people" business, so, obviously, no one seeking an on-air or sales position can be seriously considered without a face-to-face meeting or even a telephone conversation with the decisionmaker. Consequently, the Commission should require broadcasters to maintain and to report data on the referral sources of interviewees.

(4) Sources of Persons Hired. The Commission's proposal to delete the requirement that EEO outreach reports identify the source that referred the person hired for each vacancy is unobjectionable.[316/] This data has figured in Bilingual investigations, but it was never decisionally significant. However, retention of this information should be required, since it would be essential in an investigation of a case of intentional discrimination at the point of hire.

315/ Broadcasters need not fear that the Commission could erroneously require them to prefer minorities or women as interviewees. The Commission is bound by Title VII, which prevents preferential treatment on the basis of, inter alia "an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization[.]" 42 U.S.C. §2000e-2(j) (1996) (emphasis added). Thus, absent systemic discrimination, the Commission could not require a licensee to have a particular statistical representation of interviewees. That may explain why, for twenty-nine years under the original EEO rules, there was not one complaint of reverse discrimination involving a failure to

interview. It is unlikely there would be any legitimate complaints under the new proposed regulations either.

316/ See Second NPRM, supra, 16 FCC Rcd at 22854 ¶¶34, 36.

(5) Time Line For Recruiting And Filling Position, Showing When Outreach Methods Were Used. As we proposed earlier in these Comments, broad recruitment should be timed to coincide with word-of-mouth recruitment so that "inside" candidates do not get a headstart, ironclad preference or set-aside, thereby frustrating the purpose of broad recruitment.[317/] To verify that this requirement was observed, the Commission should require broadcasters to provide this basic time line for each vacancy:

(1) when the position opened to candidates not presently employed at the station;

(2) when word-of-mouth recruitment for outside candidates commenced and was completed;

(3) when broad recruitment (Internet and otherwise) commenced and was completed; and

(4) when the position was filled.

In this way, the Commission can be certain that those responding to broad recruitment have a genuine chance at winning a job.[318/] The Commission can also be sure that no broadcaster could pretend to recruit broadly when, actually, it has already filled or will imminently fill the jobs through the old-boy network.

317/ See p. 73-74 supra.

318/ Better yet, the information should be stored on the Commission's website. See pp. 146-47 infra.

3. Rather than having to maintain EEO outreach records in their public files or on their websites, regulatees should post the records on the Commission's website

The Second NPRM proposes that broadcasters should keep their outreach records in their public files, or place them on their websites if they have websites.[319/] The Commission noted that in some cases, broadcasters contended that they "might experience difficulties in incorporating the EEO public file report onto their existing web sites."[320/] Although the Internet is not yet so ubiquitous that it is accessible by everyone,[321/] it is fully accessible by broadcasters. Still, some broadcasters do not have websites. Thus, under the Commission's proposal, some EEO information would be scattered about on thousands of websites, and some of it would be tucked away in hundreds of public files.

In the electronic age, there is a simpler and more efficient approach that would place fewer responsibilities on licensees while disadvantaging the public much less: place the annual public file reports in one place -- on the Commission's website. In that way, someone wishing to do regional or market by market research can do so all in one place, not in thousands of places.

This approach would be easier for broadcasters, since they would be less likely to have to divert staff without notice to supervise visitors who want to read the public file.

All broadcasters know how to post material on the Commission's site,

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319/ Second NPRM, supra, 16 FCC Rcd at 22856 ¶44.

320/ Id.

321/ See pp. 112-13 supra.

and the Commission already has the infrastructure in place to receive and display EEO data on its site.

One-stop availability of this material would also be beneficial to members of the public, particularly scholars. Research could be conducted on labor force utilization, recruitment and employment using a wide variety of station groupings, e.g. intra-market, inter-market, platform size, company size and crossownership. The cost of developing these databases through visits to public files, one station at a time, is prohibitive.

One-stop posting would benefit the Commission in two ways. It would vastly simplify the random audit process by making all of the data available in one place.[322/] It would also enable scholars to perform a host of research studies that could not otherwise have been performed. This research would help the Commission continue to update and tailor its regulations, and thus remain confident that the regulations are effective, fair, and justified.

322/ The Commission asked whether an alternative to having the public file and website reports "might be to rely entirely on random audits by the Commission without requiring the filing of periodic reports" while noting that "[o]ur concern with this alternative would be that it would reduce the opportunity for participation by the public." Second NPRM, supra, 16 FCC Rcd at 22856 ¶43; see also First R&O, supra, 15 FCC Rcd at 23799 ¶123 ("[g]iven the Commission's limited resources, we believe that it is important that the community have a role in monitoring broadcaster compliance with our EEO Rule"); cf. Stone v. FCC, 466 F.2d 316, rehearing denied, 466 F.2d 331, 332 (D.C. Cir. 1972) (holding that a

"unified community" can sometimes "effectively supplement the constitutional and statutory authority of the FCC," a development the Court has "consistently welcomed as serving the public interest.") The Commission has never tried random audits, and it has also never experienced public participation under rules resembling the proposed new rules. Thus, the Commission cannot know in advance whether either method is adequate. Consequently, the Commission should try both methods for one renewal cycle (2003-2008; see 47 C.F.R. §73.l020) then assess both methods to see whether random audits are still needed.

VI. The Commission Should Expand The Responsibilities Of The EEO Branch

The EEO Branch produces an Annual Trend Report, with national and statewide employment data by race and gender. Scholars use this Report for longitudinal studies.

The Commission should do more than display the data in tabular form. In particular, the EEO Branch has decades of accumulated expertise and institutional memory of what this data means. That knowledge and expertise can be put to good use if the Branch were authorized to undertake both time series and correlational analysis that reveals which of the various outreach methods tend to be most useful in reaching the entire community and producing an industry inclusive of all groups, including minorities and women.[323/]

In addition, the Branch should do more to share its knowledge with regulatees and the public. The Commission could increase the value of the Branch's services, and enhance the likelihood of compliance with its regulations, by authorizing and properly funding the Branch to perform outreach. The industry certainly needs it: most small broadcasters and cable operators cannot afford to hire an equal opportunity consultant to help them develop and implement EEO programs.

The Branch can also help serve the outreach needs of the industry by dedicating a phone line for questions from the public. It can expand its participation on the Commission's

website, and maintain a booth or conference room at major industry conferences.

323/ We have proposed that the Form 395 issue be severed from this proceeding and placed in a new docket devoted to research issues on EEO and labor force trends. See pp. 135-36 supra. The role of the EEO Branch in conducting research would also be an appropriate subject for inclusion in that new docket.

The Branch could prepare print, audio, video and Internet versions of a "Guide To Mass Media EEO Best Practices" that would be filled with examples of programs that work. Finally, the Branch could hold Best Practices workshops at national and state trade association and civic organization meetings.

To undertake these functions, the Branch would need to designate or hire an expert in personnel management. This individual would have no enforcement role and would be insulated from enforcement personnel, except that she might assist in developing a voluntary alternate dispute resolution (ADR) program aimed at resolving many of the genuine EEO disputes that arise in connection with license renewals.

The industry's interactions with the EEO Branch may be the most significant factor that will determine when the broadcasting and cable industries will arrive at the Promised Land.[324/]

Respectfully submitted,

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324/ Several of our colleagues provided extraordinarily useful suggestions that are woven into these Comments. We express our appreciation and thanks to Benjamin Jealous of the National Newspaper Publishers Association, Dr. Everett Parker of the Office of Communication of the United Church of Christ, Ken Smikle of Target Market News, Eleanor Tatum of the New York Amsterdam News, S. Jenell Trigg, Esq. of Leventhal Senter & Lerman PLLC, and Dr. Clint Wilson of the Howard University School of Communications.

Counsel for EEO Supporters:

Minority Media and Telecommunications Council
Office of Communication of the United Church of Christ, Inc.
African American Media Incubator
Alliance for Community Media
Alliance for Public Technology
American Hispanic Owned Radio Association
American Indians in Film
Asian American Journalists Association
Asian American Media Development, Inc.
Black Citizens for a Fair Media
Black College Communications Association
Black Entertainment and Sports Lawyers Association
Black Entertainment and Telecommunications Association
Civil Rights Forum on Communications Policy
Cleveland Talk Radio Consortium
Cultural Environment Movement
Fairness and Accuracy in Reporting
League of United Latin American Citizens
Minorities in Communications Division of the Association for Education in Journalism and Communications
Minority Business Enterprise Legal Defense and Education Fund
NAMIC, Inc. (National Association of Minorities in Communications)
National Asian American Telecommunications Association
National Asian Pacific American Legal Consortium
National Association for the Advancement of Colored People
National Association of Black Journalists
National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals
National Association of Hispanic Journalists
National Association of Hispanic Publications
National Bar Association
National Council of Hispanic Organizations
National Council of La Raza
National Council of the Churches of Christ in the United States
National Hispanic Foundation for the Arts
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Latino Telecommunications Taskforce
National Newspaper Publishers Association
National Urban League
Native American Journalists Association
Puerto Rican Legal Defense & Education Fund
San Diego Community Broadcasting School, Inc.
Telecommunications Research and Action Center
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press

April l5, 2002

EXHIBIT 1:

EEOC, Aggregate Reports for SIC-483, Radio and Television Broadcasting (1999 and 2000)

(Contained in hard copy of Comments, and also available online at www.eeoc.gov)

EXHIBIT 2:

SUMMARY OF CONTENT OF STATE BROADCAST ASSOCIATIONS' WEBSITE EMPLOYMENT PAGES

SUMMARY OF CONTENT OF STATE BROADCAST ASSOCIATIONS' WEBSITE EMPLOYMENT PAGES

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April l2, 2002

This analysis was performed in response to the Second Notice of Proposed Rulemaking in Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, l6 FCC Rcd 22843 (200l) ("Second NPRM"). l/ It is being submitted as an appendix to the Comments of the Minority Media and Telecommunications Council et al. response to the Second NPRM.

Background

Between April l-l2, 2002, MMTC staff visited the websites of each state broadcast association, as well as the site operated by the National Alliance of State Broadcast Associations ("NASBA"), formerly the Broadcast Executive Directors Association ("BEDA").

Each site was reviewed to determine the following:

1. Whether it provides job postings and refers visitors to a site that has job postings;

2. Whether visitors can post resumes or other material; and

3. How many jobs were posted at the time visited. To be as inclusive as possible, we included parttime jobs, non-industry jobs (e.g., broadcast supplier postings), and jobs posted months or years earlier that had not been deleted from the sites.

We also gathered data on industrywide employment from the l997 EEO Trend Report (FCC, l998), which contains the most recent statewide data on the total number of fulltime jobs in broadcasting. This data can be useful in analyzing whether there is a consistent relationship, state by state, in the size of the broadcast workforce in a state and the number of jobs posted by broadcasters in that state.

Findings

In reviewing the sites and the available positions, it did not appear that the positions being offered were primarily low-level positions. The available jobs appeared to represent a broad cross-section of positions in the industry.

1/ MMTC appreciates the assistance of Fatima Fofana, Carol F. Westmoreland and Jen Smith in the preparation of this report.

Twenty-six state associations had sites that had jobs posted, and that accepted postings from job seekers. Some of these sites also linked to the NASBA site. The states were:

Alabama
California
Illinois
Indiana
Iowa
Kansas
Kentucky
Massachusetts
Michigan
Missouri
Montana
Nevada
New Hampshire
New York
Oklahoma
Oregon
South Carolina
South Dakota
Tennessee
Texas
Vermont 2/
Virginia 3/
Washington State
West Virginia 3/
Wisconsin 3/
Wyoming

Eight state associations had sites that accepted postings from broadcasters, and had jobs posted, but did not accept postings from job seekers. Some of these sites also linked to the NASBA site. The states were:

Alaska
Arkansas
Minnesota
New Mexico
North Carolina 4/
North Dakota
Ohio
Pennsylvania

2/ Visitors may not post resumes but may identify positions sought.

3/ Only members may post resumes.

4/ Visitors must pay a subscription fee to learn more about particular openings, which are listed on the site but not described in detail.

One state association -- Mississippi -- had a site that accepted postings from broadcasters, and that accepted postings from jobs seekers, but did not have any jobs posted. This site linked to the NASBA site.

Three state associations had sites that accepted postings from broadcasters but did not have any jobs posted. These sites did not accept postings from job seekers. These sites linked to the NASBA site. One of them (Hawaii) linked to the NASBA site. The states were:

Florida
Hawaii
Nebraska

Eight state associations' sites did not offer job postings or resume postings. These sites linked to the NASBA site (or, in one case, to the National Association of Broadcasters site):

Arizona
Colorado
Connecticut
Georgia
Idaho
Louisiana
Maine 5/
New Jersey

Four state associations did not have a site, or their site was not operational:

Maryland/D.C./Delaware
Puerto Rico
Rhode Island
Utah

When visited on April l2, 2002, the NASBA site contained l53 job postings. This site did not accept postings from visitors.

Chart l (below) summarizes the number of jobs posted on the state associations' sites relative to the most recent (l997) FCC data on the number of fulltime and parttime broadcast jobs in the state(s) covered by the site. The workforce data for "Total" includes data only for those states that had job sites. The total l997 broadcast workforce for all states was l9l,996; this figure does not include data for stations with fewer than five employees.